No. 92-6281-CSY
Status: GRANTED

Title: Robert Hagen, Petitioner
v.
Utah

Docketed:
October 15, 1992

Court: Supreme Court of Utah

Counsel for petitioner: Berrett,Joel D., Seneca Jr.,Martin E.

Counsel for respondent: Quealy,Michael N.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Oct 15 1992 | G | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. |
| 3 | Nov 9 1992 | | Brief of respondent Utah (PRINTED BRIEF) in opposition filed. |
| 5 | Nov 18 1992 | X | Brief amici curiae of Duchesne County, et al. filed. |
| 6 | Nov 18 1992 | X | Brief amici curiae of California, et al. filed. |
| 10 | Nov 18 1992 | X | Brief amicus curiae of Ute Indian Tribe filed. |
| 4 | Nov 19 1992 | | DISTRIBUTED. December 4, 1992 |
| 7 | Dec 2 1992 | X | Supplemental brief of petitioner Robert Hagen filed. |
| 8 | Dec 7 1992 | P | The Solicitor General is invited to file a brief in this case expressing the views of the United States. |
| 9 | Mar 23 1993 | | Brief amicus curiae of United States filed. |
| 11 | Mar 25 1993 | | REDISTRIBUTED. April 16, 1993 |
| 12 | Apr 2 1993 | X | Supplemental brief of petitioner filed. |
| 14 | Apr 19 1993 | | Petition GRANTED. |
| | | | ********** |
| 16 | Apr 27 1993 | | Order extending time to file brief of petitioner on the merits until June 18, 1993. |
| 17 | May 19 1993 | D | Motion of Ute Indian Tribe for leave to intervene filed. |
| 19 | May 20 1993 | X | Brief of respondent in response to the motion of the Ute Indian Tribe to intervene filed. |
| 18 | May 24 1993 | | REDISTRIBUTED. May 28, 1993 |
| 20 | Jun 1 1993 | | Motion of Ute Indian Tribe for leave to intervene DENIED. Opinion per curiam. Justice Blackmun would grant this motion. |
| 21 | Jun 18 1993 | | Brief amicus curiae of United States filed. |
| 22 | Jun 18 1993 | | Brief amicus curiae of Navajo Nation filed. |
| 25 | Jun 18 1993 | | Brief amicus curiae of Ute Indian Tribe filed. |
| 23 | Jun 21 1993 | G | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| 26 | Jul 1 1993 | | Joint appendix filed. |
| 27 | Jul 1 1993 | | Brief of petitioner Robert P. Hagen filed. |
| 29 | Jul 14 1993 | | Order extending time to file brief of respondent on the merits until August 18, 1993. |
| 30 | Aug 4 1993 | | Record filed. |
| | | * | Original proceedings Supreme Court of Utah. (4 BOXES) |
| 31 | Aug 18 1993 | | Brief amicus curiae of Uintah County, Utah filed. |
| 32 | Aug 18 1993 | | Brief amici curiae of Fremont County, Wyoming, et al. filed. |
| 33 | Aug 18 1993 | | Brief amicus curiae of Roosevelt City filed. |
| 34 | Aug 18 1993 | | Brief amici curiae of South Dakota, et al. filed. |
| 35 | Aug 18 1993 | G | Motion of Council of State Governments, et al. for leave |

No. 92-6281-CSY

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| | | | to file a brief as amici curiae filed. |
| 36 | Aug 18 1993 | | Brief of respondent Utah filed. |
| 37 | Aug 18 1993 | | Brief amicus curiae of Duchesne County, Utah filed. |
| 38 | Sep 9 1993 | | CIRCULATED. |
| 39 | Sep 10 1993 | | SET FOR ARGUMENT TUESDAY, NOVEMBER 2, 1993.(2ND CASE). |
| 42 | Sep 18 1993 | X | Reply brief of petitioner filed. |
| 40 | Sep 24 1993 | | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| 41 | Sep 24 1993 | | Motion of Council of State Governments, et al. for leave to file a brief as amici curiae GRANTED. |
| 43 | Nov 2 1993 | | ARGUED. |

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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92-6281

ORIGINAL

ROBERT P. HAGEN,

PETITIONER,

vs.

STATE OF UTAH,

RESPONDENT.

Supreme Court, U.S.
FILED
OCT 15 1992
OFFICE OF THE CLERK

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Robert P. Hagen, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has not sought leave to proceed in forma pauperis in any other court. Petitioner's affidavit in support of this motion is attached hereto.

Joel D. Berrett
Attorney for Petitioner

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, ROBERT HAGEN being first duly sworn, depose and say that I am the petitioner in the above-entitled case, that in support of my Motion for Leave to Proceed In Forma Pauperis, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes___ No X
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and amount of the salary or wages per month which you received.
   McCabe Brothers Drilling June, 1992 590

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes X No___
   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.
   Grace Drilling $2,000.00
   McCabe Brothers Drilling 590.00

3. Do you own any cash or checking or savings account? Yes___ No X
   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes X No___
   a. If the answer is yes, describe the property and state its approximate value.
   1978 Dodge (not running) $100.00

5. List the persons who are dependent upon you for support and state your relationship to those persons.
   None

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Subscribed and sworn to before me this 13 day of October, 1992

/s/ Robert Hagen

Notary

My commission expires: 11/10/95

ORIGINAL

No. 92-6281

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT P. HAGEN,

PETITIONER,

vs.

STATE OF UTAH,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF UTAH

PETITION FOR WRIT OF CERTIORARI

Joel D. Berrett
P.O. Box 262
Roosevelt, Utah 84066
Telephone: (801) 722-3606
Counsel for Petitioner

## QUESTION PRESENTED

Whether the Uintah and Ouray Indian Reservation was diminished by the Act of May 27, 1902, 32 Stat. 245 so as to confer criminal jurisdiction over Indians within the unallotted area of the reservation upon the State of Utah?

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NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

ROBERT P. HAGEN,

PETITIONER,

vs.

STATE OF UTAH,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Petitioner, Robert P. Hagen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Utah in State v. Hagen holding that the Uintah and Ouray Indian Reservation has been diminished and that Myton, Utah is therefore outside the boundaries of the reservation.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Utah in State v. Hagen is printed in the Utah Advance Reports at 191 Utah Adv. Rep. 26 (1992) and appears in

Appendix A to this petition. The case has not yet been published in Pacific Second Reporter. The opinion of the Supreme Court of the State of Utah in State v. Perank is printed in the Utah Advance Reports at 191 Utah Adv. Rep. 5 (1992) and appears in Appendix B to this petition. The case has not yet been published in Pacific Second Reporter. The Perank case is included in the Appendix because it is necessary to ascertain the grounds of the opinion in Hagen.

JURISDICTION

The decision of the Supreme Court of the State of Utah in Hagen was filed on July 17, 1992. This court's jurisdiction is invoked under Title 28 U.S.C. Section 1257.

STATUTORY PROVISIONS INVOLVED

Act of May 27, 1902, 32 Stat. 245, 263-264 is set forth in Appendix C.

Act of March 3, 1903, 32 Stat. 982, 997-998 is set forth in Appendix D.

Act of April 21, 1904, 33 Stat. 189, 207-208 is set forth in Appendix E.

Act of March 3, 1905, 33 Stat. 1048, 1069-1070 is set forth in Appendix F.

18 U.S.C. § 1151 is set forth in Appendix G.

18 U.S.C. § 1257.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On or about August 28, 1989, petitioner pleaded guilty to Distribution of a Controlled Substance, a Third Degree Felony, in the Eighth Judicial District Court of



Duchesne County, State of Utah. The crime took place in Myton, Duchesne County, Utah. Myton, Utah is included wholly within the exterior boundaries of the Uintah and Ouray Indian Reservation. A map showing the location of Myton, Utah within the boundaries of the Uintah and Ouray Reservation appears in the Appendix. (Appendix H). The map is part of the court's opinion in Ute Indian Tribe v. State of Utah , 521 F. Supp. 1072 (D. Utah 1981). Petitioner has printed Myton on the map showing where Myton is located.

B. PROCEDURAL HISTORY

On or about April 19, 1988, the State of Utah filed an information against the petitioner in the Eighth Judicial District Court of Duchesne County, State of Utah, charging him with Distribution of a Controlled Substance, a Third Degree Felony, alleging that the crime occurred in Myton, Utah. On or about August 3, 1988 the charge was dismissed against petitioner without prejudice on the basis that the petitioner was being prosecuted for the same offense in a Federal Court. The State of Utah refiled the charges against the petitioner on or about March 13, 1989. On or about August 28, 1989, the petitioner entered a plea of guilty to the charge of Distribution of a Controlled Substance, a Third Degree Felony.

On or about January 4, 1990, and prior to sentencing, the petitioner filed a Motion to Arrest Judgment pursuant to Rule 23, Utah Rules of Criminal Procedure, claiming that he was an Indian and that the state court did not have jurisdiction over criminal offenses committed by

Indians on the Uintah and Ouray Indian Reservation. The state argued that petitioner was not an Indian and that Myton, Utah was not part of the reservation. The trial court denied petitioner's Motion to Arrest Judgment holding that petitioner was not an Indian while declining to rule on the contention of the State that Myton was not on the reservation. A copy of the transcript of a portion of the state's argument and the court's order appears in the Appendix. Appendix I. Petitioner appealed the decision of the trial court to the Utah Court of Appeals which overruled the decision of the trial court holding that petitioner was an Indian and that Myton was within the confines of the Uintah and Ouray Indian Reservation based on Ute Indian Tribe v. State of Utah , 773 F. 2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). State v. Hagen , 802 P. 2d 745 (Utah App. 1990).

After the decision of the Court of Appeals, the State of Utah filed a Petition for a Writ of Certiorari with the Supreme Court of the State of Utah. In it's petition, one of the state's arguments was that the Utah Court of Appeals erroneously concluded that the Utah Supreme Court could not reach a decision in State v. Perank , then on appeal to the Utah Supreme Court, contrary to the opinion of the Tenth Circuit Court in Ute Indian Tribe , supra. A copy of the first page of the state's petition appears in the Appendix. Appendix J. The Supreme Court of the State of Utah granted the petition and thereafter issued its opinion referred to herein. Based on its decision in State



v. Perank , which held that the Uintah and Ouray Indian Reservation had been diminished, the Utah Supreme Court reversed the decision of the Utah Court of Appeals in State v. Hagen , supra, holding that the State of Utah had jurisdiction over petitioner because Myton, Utah is not in Indian country.

C. STATEMENT OF PERANK CASE

A brief history of the Perank case is included since it is a companion case that contains the analysis of the Supreme Court of the State of Utah in holding that the Uintah and Ouray Indian Reservation has been disestablished. Perank's case reached the Supreme Court of the State of Utah before petitioner's case.

Clint Perank was convicted in the Seventh Judicial District Court of Duchesne County, State of Utah of burglary, a third degree felony. He was placed on probation. Later the trial court revoked his probation and ordered him committed to the Utah State Prison for a term of 0-5 years. Perank appealed the probation revocation and the Supreme Court of the State of Utah stayed execution of the sentence pending appeal. Perank argued to the Utah Supreme Court that the trial court lacked jurisidiction to convict him because he was an Indian and the offense occurred within Indian county.

In its opinion, the Supreme Court of the State of Utah determined that Perank was an Indian for the purposes of criminal jurisidiction. The court then determined that the Uintah and Ouray Indian Reservation had been diminished

and that Myton, Utah was part of the unallotted lands of the reservation and was outside of the boundaries of the reservation and not within Indian country.

REASONS FOR GRANTING WRIT

I

THE SUPREME COURT OF THE STATE OF UTAH, A STATE COURT OF LAST RESORT, HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH AN OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The issue of whether the Uintah and Ouray Indian Reservation has been diminished has been extensively litigated in the Federal Courts. The Ute Indian Tribe filed a complaint against the State of Utah in October 1975 in the United States District Court for the District of Utah seeking to establish the exterior boundaries of the Uintah and Ouray Reservation among other claims. The District Court ruled that the Uintah and Ouray Reservation had not been disestablished with some exceptions not relevent to this case. Ute Indian Tribe v. State of Utah , 521 Supp. 1072 (D. Utah 1981).

Appeals were taken and the Tenth Circuit Court of Appeals in Ute Indian Tribe v. State of Utah , 716 F. 2d 1298 (10th Cir. 1983) reversed the decision of the District Court and held that the unallotted lands on the reservation had lost all reservation status and become part of the public domain. On a motion for rehearing, the Tenth Circuit Court of Appeals, en banc , reversed the prior Tenth



Circuit decision holding that the Uintah and Ouray Reservation had not been diminished. Ute Indian Tribe v. State of Utah , 773 F. 2d 1087 (10th Cir. 1985), (en banc). The state filed a petition for a Writ of Certiorari with the United States Supreme Court which was denied. 479 U.S. 994 (1986). The end result of the litigation in the Tenth Circuit was that the Uintah and Ouray Indian Reservation includes Myton, Utah, the location where the crime occurred.

In contrast, the Hagen decision of the Supreme Court of the State of Utah concludes that the unallotted lands of the Uintah and Ouray Indian Reservation have been restored to the public domain and the reservation boundaries were diminished by that restoration and the State of Utah has jurisdiction in that area. The existence of these conflicting federal and state court decisions highlights the need for a decision by this Court.

The issue decided by the Supreme Court of the State of Utah, whether the Uintah and Ouray Indian Reservation has been diminished, is identical with the issue decided by the Tenth Circuit (en banc) in Ute Tribe . Both the Ute Indian Tribe and the State of Utah had a full and fair opportunity to litigate the issue which was adjudicated on the merits by the Tenth Circuit.

Because the decisions of the Supreme Court of the State of Utah and the United States Court of Appeals for the Tenth Circuit are in direct conflict on the same issue of federal law, this court should grant the petition in order to review the question presented herein.

On two prior occasions, this court has granted a petition for a writ of certiorari when a state's highest court and a United States Court of Appeals disagreed on whether an Indian reservation had been diminished. In both Decoteau v. District County Court for 10th Judicial District , 420 U.S. 425 (1975) and Solem v. Bartlett , 465 U.S. 473 (1984) this court granted certiorari because the Supreme Court of South Dakota had reached a different result than the Eighth Circuit Court of Appeals on whether Indian reservations had been disestablished. This Court affirmed the decision of the South Dakota Supreme Court in DeCoteau and affirmed the decision of the Eighth Circuit Court of Appeals in Solem .

II

THE SUPREME COURT OF THE STATE OF UTAH HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The question presented in this petition involves the jurisidictional status of the unallotted lands within the Uintah and Ouray Indian Reservation which were restored to the public domain by the Act of May 27, 1902, 32 Stat. 245 provided the consent of the adult male Indians of the Uintah and White River Tribes of Ute Indians could be obtained. Consent was never given as required. The importance of any diminishment decision is clear. An area must either lie within the jurisdiction of the State Courts or within the jurisdiction of the Tribal and Federal Courts.



In this action, the state is seeking to assert state criminal jurisdiction over land allegedly restored to the public domain by acts passed by Congress in the early 1900's. Act of May 27, 1902, 32 Stat. 245, 263-264. Act of March 3, 1903, 32 Stat. 982, 997-998. Act of April 21, 1904 33 Stat. 189, 207-208. Act of March 3, 1905, 33 Stat. 1048, 1069-1070. The determination is important to the general public and essential for law enforcement personnel.

In addition to the uncertainty currently facing law enforcement personnel involving incidents occuring on the unallotted land within the boundaries of the Uintah and Ouray Indian Reservation, the Hagen decision issued by the Supreme Court of the State of Utah, has put in question the proper governmental authority to collect taxes, regulate zoning, determine family law issues, issue and enforce environmental regulations, regulate businesses, determine the legality of gambling, control the sale of alcohol and regulate employment relationships.

Until a decision is rendered by this court, the question presented in this petition will continue to be raised in the state and lower federal courts. Without a decision by this court, there will be no final resolution of the question, thereby continuing the jurisdictional quagmire that presently exists within the original boundaries of the Uintah and Ouray Indian Reservation.

Because of the conflict between the state and the federal courts on the issue of jurisdiction over the unallotted lands within the Uintah and Ouray Indian

Reservation, the practical problems involved in providing effective law enforcement in this area are great. Both the state and federal governments and the Ute Indian Tribe have a strong interest in knowing which governmental agency has jurisdiction over potential criminal defendants and under what law a potential defendant should be charged. Until a final determination is made, the law enforcement problems will continue to exist. The question presented in this petition is one of exceptional importance to the State of Utah, the affected counties, the Ute Indian Tribe and the general public living within the area in question. The jurisdictional question presented herein should be heard and decided by this court.

CONCLUSION

Based on the foregoing argument and authorities, petitioner, Robert P. Hagen, prays that his petition for Writ of Certiorari to the Supreme Court of the State of Utah be granted.

DATED: October 14, 1992.

Respectfully submitted,

Joel D. Berrett
Attorney for Petitioner





certiorari to the Utah Court of Appeals to determine whether that court correctly upheld the State's exercise of jurisdiction.

For purposes of criminal jurisdiction, our decision today in *State v. Perank*, 191 Utah Adv. Rep. 5 (Utah July 17, 1992), establishes that Roosevelt, Utah, is not in Indian country. *See id.* at 19 n.10. In *Perank*, we held that 1902 and 1905 congressional acts diminished the original Uintah Indian Reservation boundaries and that subsequent homesteading and settlement therefore occurred on lands restored to the public domain. *See id.* at 6, 11-13. The community of Roosevelt, Utah, where defendant issued all but $70 of the checks involved in this prosecution, is therefore not in Indian country. *See id.* at 19 n.10. Thus, all of the Roosevelt checks may form the basis of state court jurisdiction, regardless of defendant's personal Indian status and regardless of whether the Vernal bank's refusal of the checks suffices to create state court jurisdiction. We therefore affirm defendant's conviction on grounds other than those upon which the court of appeals relied.

Affirmed.

WE CONCUR:
Gordon R. Hall, Chief Justice
Richard C. Howe, Associate Chief Justice
I. Daniel Stewart, Justice
Zimmerman, Justice, dissents.

1. There are certain exceptions to this general grant of jurisdiction. These exceptions, however, are not relevant to the disposition of this case.

Cite as
**191 Utah Adv. Rep. 26**

**IN THE SUPREME COURT OF THE STATE OF UTAH**

**STATE of Utah,**
**Plaintiff and Petitioner,**
**v.**
**Robert HAGEN,**
**Defendant and Respondent.**

**No. 910017**
**FILED: July 17, 1992**

Eighth District, Duchesne County
The Honorable Dennis L. Draney

ATTORNEYS:
R. Paul Van Dam, David B. Thompson, Michael M. Quealy, Salt Lake City, for plaintiff
Joel Berrett, Roosevelt, for defendant

**This opinion is subject to revision before publication in the Pacific Reporter.**

**On Certiorari to the Utah Court of Appeals**

*DURHAM, Justice*:

Defendant Robert Hagen pleaded guilty in Eighth District Court to distributing a controlled substance, a third degree felony under Utah Code Ann. §58-37-8(1)(b)(ii) (Supp. 1991). The plea affidavit stated that defendant sold marijuana from his residence in Myton, Duchesne County, Utah. Prior to sentencing, defendant moved to arrest judgment and to withdraw his guilty plea. In his motion, he challenged the court's jurisdiction on the basis that he was an Indian and his alleged crime occurred in Indian country, the Uintah-Ouray Reservation, and was thus not subject to state court jurisdiction. Federal law provides for exclusive federal jurisdiction over a defendant who is an American Indian and who commits a criminal offense in Indian country.[1] 18 U.S.C. §§1152, 1153 (1988). The court denied the motion. Defendant subsequently appealed the conviction to the Utah Court of Appeals. The court of appeals reversed defendant's conviction, holding that a 1985 Tenth Circuit decision had conclusively determined that Myton was in Indian country and holding that the State had failed to meet its burden of disproving defendant's personal Indian status. We issued a writ of certiorari to review the decision of the court of appeals.

We conclude that the court of appeals erred in treating Myton as Indian country. This court's opinion today in *State v. Perank*, 191 Utah Adv. Rep. 5 (Utah July 17, 1992), establishes that for purposes of criminal jurisdiction, Myton, Utah, is not in Indian country. *See id.* at 19 n.10; *id.* at 18. In *Perank*, we held that 1902 and 1905 congressional acts diminished the original Uintah Indian Reservation boundaries and that subsequent homesteading and settlement therefore occurred on lands restored to the public domain. *See id.* at 6, 11-13. We concluded that Myton, Utah, where defendant's alleged criminal conduct occurred, is therefore not in Indian country. *See id.* at 18. Thus, in the instant case defendant's criminal conduct in Myton may form the basis of state court jurisdiction, regardless of defendant's personal Indian status. We therefore reverse the decision of the court of appeals and reinstate defendant's conviction.

Reversed.

WE CONCUR:
Gordon R. Hall, Chief Justice
Richard C. Howe, Associate Chief Justice
I. Daniel Stewart, Justice

Zimmerman, Justice, dissents.

1. There are certain exceptions to this general grant of jurisdiction. These exceptions, however, are not relevant to the disposition of this case.

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Cite as
191 Utah Adv. Rep. 27

IN THE SUPREME COURT
OF THE STATE OF UTAH

Archie W. THURSTON,
Plaintiff and Appellant,
v.
BOX ELDER COUNTY,
Defendant and Appellee.

No. 900040
FILED: July 21, 1992

First District, Box Elder County
The Honorable Franklin L. Gunnell

ATTORNEYS:
Philip C. Patterson, Ogden, for Archie Thurston
Dale J. Lambert, Karra J. Porter, Salt Lake City, and Jon J. Bunderson, Brigham City, for Box Elder County

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This opinion is subject to revision before publication in the Pacific Reporter.

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STEWART, Justice:

Plaintiff Archie Thurston appeals from a district court order granting summary judgment to defendant Box Elder County. Thurston, a former county employee, claims that his termination pursuant to a county-wide reduction in force ("RIF") violated the Box Elder County Personnel Policies and Procedures Manual ("Manual"), which governed his employment. We reverse and remand.

On an appeal from a summary judgment, we construe the evidentiary material submitted on the motion and all reasonable inferences to be drawn therefrom in a light most favorable to the party opposing the motion. *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1039 (Utah 1989); *Caldwell v. Ford, Bacon & Davis Utah, Inc.*, 777 P.2d 483, 483 (Utah 1989). We review the district court's legal conclusions for correctness. *Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225, 229 (Utah 1987).

The Box Elder County Road Department hired Thurston in May 1975. From 1983 through 1988, Thurston served as lead worker/foreman. In April 1988, the County adopted a manual which set forth personnel policies, rules, and standards governing employee RIF actions, categories of rule infractions subject to disciplinary action, and administrative grievance procedures. Section II(F) of the Manual defines the standard for implementing a RIF:

> When circumstances (such as lack of funds or lack of work) dictate that a reduction in force is needed, the Elected Official or Department Head shall lay off the necessary number of employees with consideration to length of service and/or individual performance.

In November 1988, the Box Elder County Commission ordered the County Road Department to lay off three employees. On December 16, 1988, County Road Superintendent John Collom gave Thurston a blue slip notifying him that he would be terminated pursuant to the RIF. On December 30, 1988, the County terminated Thurston and permanently eliminated his position.

At the time of the RIF, the Road Department employed twenty-eight persons, twenty of whom had less seniority than Thurston. Collom considered several factors in determining that Thurston should be laid off. When he handed Thurston the blue slip, Collom stated that in making the decision he had considered his belief that financially, Thurston could better tolerate the separation than could some of the younger employees. Collom based this belief on prior statements by Thurston that he could readily obtain employment with a former employer. In a subsequent conversation with Thurston, Collom added poor job performance and insubordination as reasons for the termination. Collom specifically referred to Thurston's poor performance on a fencing project completed two weeks prior to the layoff and on a county road culvert installation project supervised by Thurston the previous summer. This was the first time Collom had expressed dissatisfaction with Thurston's job performance for any reason. Thurston's official personnel file, including annual performance appraisals, showed no disciplinary action for deficient job performance or work conduct, even though Section V of the Manual defines infractions for which an employee may be disciplined as gross neglect of duty, refusal to comply with lawful instructions, insubordination, or incompetency and inefficiency in the performance of job duties.

Thurston appealed his employment termination under the Manual's grievance procedures. At the grievance hearing before the Box Elder County Board of Appeals, Collom testified that in addition to considering Thurston's seniority and his belief that Thurston had a job waiting for him, Collom had selected Thurston for termination for unacceptable job performance on nine different projects. The nine projects spanned an approximate five-year period, during which Collom never invoked the Manual's disciplinary action procedures against Thurston. The Board concluded that Collom's decision to dismiss Thurston complied with the Manual's RIF provisions.

Thurston filed this action against the County in district court for breach of an employment contract and sought to have his employment





The order of restitution in favor of the SLCPD is vacated.

WE CONCUR:
Gordon R. Hall, Chief Justice
I. Daniel Stewart, Justice
Christine M. Durham, Justice
Michael D. Zimmerman, Justice

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE of Utah,
Plaintiff and Appellee,
v.
Clinton PERANK,
Defendant and Appellant.

No. 860243
FILED: July 17, 1992

Seventh District, Duchesne County
The Honorable Richard C. Davidson

ATTORNEYS:
David L. Wilkinson, Earl F. Dorius, Michael M. Quealy, Dallin W. Jensen, Salt Lake City, for State of Utah
Kirk C. Bennett, West Valley, for Perank
Alvin G. Nash, Vernal, Herbert W. Gillespie, Duchesne, Tom D. Tobin, Alvin Pahlke, Susan W. Pahlke, Winner, South Dakota, for Amici Duchesne County and Uintah County
Stephen G. Boyden, Salt Lake, for Amicus Ute Indian Tribe

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This opinion is subject to revision before publication in the Pacific Reporter.

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STEWART, Justice:

Clinton Perank was convicted in a state court of committing a burglary in Myton, Utah, in violation of Utah Code Ann. §76-6-202 (1978), and placed on probation. The court thereafter revoked his probation and ordered him committed to the Utah State Prison for a term of 0-5 years. Perank appealed from the revocation of probation, and we stayed execution of the sentence pending appeal.[1]

Perank argues that the state trial court lacked jurisdiction to convict him of burglary and that the Ute Tribal Court had exclusive jurisdiction because he is an Indian and the offense occurred within Indian country. Two issues are presented: (1) whether Perank is an Indian and (2) whether the Uintah-Ouray Indian Reservation was diminished by an act of Congress, leaving Myton, Utah, outside the jurisdictional boundaries of that Reservation.

Even though Perank pleaded guilty to the burglary charge and did not raise the issue of lack of subject matter jurisdiction with respect to the burglary until the probation revocation proceeding, the issue is properly before this Court. A plea of guilty does not waive a claim that the court lacks power to adjudicate a charge against the defendant. *Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974); *see also* 1 Charles A. Wright, *Federal Practice and Procedure* §175, at 623-33 (1982). Also, the issue of subject matter jurisdiction can be raised at any time. *See Glasmann v. Second District Court*, 80 Utah 1, 7, 12 P.2d 361, 363 (1932).

This Court invited the United States Department of Justice to file an amicus curiae brief in this case because of the importance of the issue of the location of the boundaries of the Uintah-Ouray Indian Reservation (sometimes hereinafter "Uintah Reservation") and because the Department had filed an amicus brief in opposition to the State of Utah's petition for certiorari to the United States Supreme Court from a decision of the United States Court of Appeals for the Tenth Circuit which held that the Uintah Reservation had not been diminished under a series of congressional acts from 1902 to 1905. *See Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986). The Department of Justice submitted to this Court a copy of the amicus brief it filed for the United States opposing the State's petition for certiorari in *Ute Indian Tribe*. In that brief, the Department stated, inter alia, that the issues presented in the petition for a writ of certiorari did not require review by the Supreme Court at that time because they could be addressed in a later case if the Utah Supreme Court were to disagree with the Tenth Circuit.[2]

The Ute Indian Tribe, also at our invitation, filed an amicus brief, but addressed only the issue of whether Perank is an Indian within the meaning of 18 U.S.C. §1152. We note that neither Perank, the Department of Justice, nor the Tribe suggests that the Tenth Circuit's *en banc* decision in *Ute Indian Tribe* has res judicata effect in this case.[3]

## I. PERANK'S INDIAN STATUS

State criminal jurisdiction does not extend to Indians who commit crimes in Indian country. *See* 18 U.S.C. §§1152, 1153 (1982 & Supp. 1991).[4] Federal statutes, however, do not define the term "Indian" for jurisdictional purposes. Although the State concedes that Perank is an Indian, the Tribe, as amicus, argues that he is not. Ordinarily, an amicus may only present arguments pertaining to issues properly raised by the parties before the court. However, because this issue goes to subject matter jurisdiction, we will address it.

The Tribe argues that Perank is not an Indian under the jurisdictional statute because he was not officially enrolled as a member of the Tribe at the time of the burglary. We disagree and hold that Perank was an Indian at the time of the

crime for purposes of 18 U.S.C. §§1152, 1153.[5]

*United States v. Rogers*, 45 U.S. (4 How.) 567, 572-73 (1846), set forth two factors to be evaluated in determining who is an Indian. A person is an Indian who (1) has a significant degree of Indian blood and (2) is recognized as an Indian by a tribe or society of Indians or by the federal government. *See United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977); *St. Cloud v. United States*, 702 F. Supp. 1456, 1460 (D.S.D. 1988); *State v. LaPier*, 790 P.2d 983, 986 (Mont. 1990); *State v. Attebery*, 519 P.2d 53, 54 (Ariz. 1974); *see also Ex parte Pero*, 99 F.2d 28, 30-32 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939); Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 515-16 (1976).[6]

We turn to the first factor, whether Perank has a significant degree of Indian blood. As the son of a full-blood Ute father and a mixed-blood mother, Perank has more than one-half Indian blood and at least one-half Ute blood, which is sufficient to satisfy the first requirement under *Rogers*. Persons with less than one-half Indian blood have been held to have a significant degree of Indian blood. *See, e.g., St. Cloud*, 702 F. Supp. at 1460-61 (holding 15/32 Yankton Sioux blood sufficient to establish the first *Rogers* requirement and citing four cases which held less than 1/2 Indian blood to be sufficient); *Makah Indian Tribe v. Clallam County*, 440 P.2d 442, 444 (Wash. 1968) (1/4 Indian blood sufficient).

Perank has also been recognized as an Indian by both the Tribe and the federal government. Although Perank was not formally enrolled in the Ute Tribe at the time of his conviction, lack of enrollment does not determine Indian status for purposes of jurisdiction. *See Ex parte Pero*, 99 F.2d at 31; *St. Cloud*, 702 F. Supp. at 1461; *LaPier*, 790 P.2d at 987. Nevertheless, the Tribe formally recognized Perank as an Indian and as a member of the Tribe by his enrollment in the Tribe at a later date. Moreover, under the terms of the Ute Indian Tribe Constitution, it appears that Perank was a member of the Ute Tribe at the time of the offense. Article II, section 1(b) of the Constitution provided that a child born to a member of the Tribe living on the Reservation at the time of the birth is entitled to membership. That provision states:

> Section 1. The membership of the Ute Indian Tribe of the Uintah and Ouray Reservation shall consist as follows:
>
> . . . .
>
> (b) All children born to any member of the Ute Indian Tribe of the Uintah and Ouray Reservation who is a resident of the Reservation at the time of the birth of said children.

Ute Indian Tribe of the Uintah and Ouray Reservation Const. art. II, §1.[7] Perank's father was an enrolled member of the Tribe and resided on the Reservation when Perank was born.[8] In *Chapoose v. Uintah & Ouray Tribal Business Committee*, Civ. No. 133-77, slip op. at 16-19 (Ute Tribal App. Ct. Jan. 22, 1981), the Ute Tribal Appellate Court held that Tribe membership was an automatic right for those who qualified under article II, section 1 of the Ute Constitution. Enrollment merely formalized the right.

In addition, according to an affidavit filed by Perank in the trial court, he has lived as an Indian by maintaining social, political, and spiritual relations as an Indian, including participation in Indian rituals. In his brief, he states that he "has lived his life as an Indian, and has been treated as an Indian by governmental entities." Also, in January 1986, Perank was convicted of three offenses in the Ute Tribal Court.

On these facts, we conclude that Perank carried his burden of factually establishing that he has been "recognized racially" as a Ute Indian. Accordingly, we hold that Perank is an Indian for the purpose of determining jurisdiction under 18 U.S.C. §§1152 and 1153.

## II. THE BOUNDARIES OF THE UINTAH-OURAY RESERVATION

The next issue is whether Myton, Utah, the site of the burglary, lies within Indian country, i.e., within the boundaries of the Uintah-Ouray Reservation. If so, the district court lacked jurisdiction over the crime under 18 U.S.C. §1152.[9] There are two contentions: first, that Myton is not within the Uintah-Ouray Reservation because the Reservation was diminished by a 1902 congressional Act as amended and supplemented by subsequent Indian Appropriation Acts in 1903, 1904, and 1905, and second, that the 1905 Act opened the Reservation without regard to the 1902 Act and that the language of the 1905 Act left the boundaries of the Reservation intact.

Resolution of the diminishment issue turns on two issues. The first is whether the language of the Act of May 27, 1902, which provided that the unallotted lands were to be "restored to public domain," if used as operative statutory language opening a reservation would effect a diminishment of that reservation as to the lands so restored. The second issue is whether, as a matter of statutory construction, the operative language in the 1902 Act, "restored to the public domain," remained in effect as operative statutory language when the Reservation was finally opened in 1905.

We hold that the restoration language in the 1902 Act established the necessary congressional intent to diminish the Reservation as to those lands restored to the public domain and that the restoration language in the 1902 Act remained operative statutory language when the Reservation was opened in 1905.

For clarity, we observe that all parties agree that the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for





tribal use. These lands are collectively referred to as "trust lands." Furthermore, it is an undisputed fact that approximately 1,010,000 Reservation acres were withdrawn and attached to what are now the Ashley and Uintah National Forests by presidential proclamation, pursuant to the 1905 Act. The legal status of these lands is not at issue here, nor is the legal status of the Uncompahgre Reservation, a neighboring reservation in eastern Utah. In 1948, Congress added to the Reservation 510,000 acres known as the Hill Creek Extension. Act of March 11, 1948, 62 Stat. 72. The status of that land is likewise not at issue. We note that the *en banc* decision in *Ute Indian Tribe* held that the land added to the Uintah National Forest remained in the Reservation and that the Uncompahgre Reservation was not disestablished. 773 F.2d 1089-90; *id.* at 1099-1101 (Seymour, J., concurring). The only issue in this case, therefore, is whether the unallotted and unreserved lands that were opened to entry in 1905 and not later restored to tribal ownership and jurisdiction by the 1945 "Order of Restoration" are within the present boundaries of the Reservation.[10]

### *A. Congressional Intent to Diminish*

In 1887, Congress initiated a significant change in policy toward the Indians. The new policy was designed to integrate the Indians into white, agrarian society and ultimately to do away with the reservation system. The General Allotment Act of 1887, ch. 119, 24 Stat. 388, authorized the President to allot parcels of reservation lands to Indians and, with tribal consent, to sell the unallotted, or surplus, reservation lands to non-Indians. Thereafter, Congress from time to time enacted special legislation to ensure that a particular reservation was in fact opened to allotment. *Mattz v. Arnett*, 412 U.S. 481, 497 (1973).

Questions subsequently arose regarding whether Congress in opening an Indian reservation, or a portion of it, to entry and settlement by non-Indians intended to leave the reservation boundaries intact so that the land opened to settlement remained within the boundaries of the reservation or whether the opening was also intended to diminish the reservation boundaries, thereby placing the opened land outside the reservation. In *Solem v. Bartlett*, 465 U.S. 463, 468 (1984), the Court explained why Congress in enacting the surplus land acts around the turn of the century often did not make its intent with respect to diminishment explicit:

> Unfortunately, the surplus land Acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When the surplus land Acts were passed, the distinction seemed unimportant. The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians hold some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians. Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries. *See* Act of June 25, 1948, ch. 645, §1151, 62 Stat. 757 (codified at 18 U.S.C. §1151 (1982 ed.) . . .).
>
> Another reason why Congress did not concern itself with the effect of surplus land Acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, Members of Congress voting on the surplus land Acts believed to a man that within a short time--within a generation at most--the Indian tribes would enter traditional American society and the reservation system would cease to exist. Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation.

As a consequence, each surplus land act must be examined to determine whether Congress intended to reduce the reservation's boundaries because each act employed its own statutory language, "the product of a unique set of tribal negotiation and legislative compromise." *Solem*, 465 U.S. at 467. Accordingly, the effect of a given surplus land act depends on the language of the act and the circumstances underlying its passage. *Id.* at 469.

The most probative evidence of whether Congress intended to diminish a reservation is the language used in the statutory scheme opening the reservation. *Solem*, 465 U.S. at 470. In addition to the intent derived from the face of the act, the surrounding circumstances and the legislative history are to be examined in determining congressional intent. *Rosebud Sioux Tribe v. Kneip*, 430 U.S., 584, 587 (1977) (citing *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)). Subsequent treatment of the opened lands by Congress, federal agencies, and local authorities, *Solem*, 465 U.S. at 471, and subsequent jurisdictional history of the opened lands, *Rosebud*, 430 U.S. at 603-05; *DeCoteau v. District County Court*, 420 U.S. 425, 442-44 (1975), may also be useful in resolving the issue of congressional intent to diminish. Congress, however, must have clearly evinced an intent to change the boundaries before diminishment will be found. *Solem*, 465 U.S. at 470. And although doubtful language should be construed in favor of the Indians and against diminishment, this rule of construction does not dictate a determination that reservation boundaries were not diminished when there is a clear intent to the contrary. *See Rosebud*, 430 U.S. at 587.

A variety of operative statutory phrases have been held to effect diminishment. *See Rosebud*, 430 U.S. at 683-84 (Marshall, J., dissenting);[11] *Russ v. Wilkins*, 624 F.2d 914, 921-22 (9th Cir. 1980); *United States v. Parkinson*, 525 F.2d 120, 122-24 (8th Cir. 1975), *cert. denied*, 430 U.S. 982 (1977). No specific talismanic statutory language is required to conclude that Congress intended to diminish a reservation. *See Solem*, 470 U.S. at 471, and it is not necessary that statutory language expressly sever tribal jurisdiction to effectuate a diminishment. *See Rosebud*, 430 U.S. at 586-605; *see also Solem*, 465 U.S. at 469 n.10. Also, a congressional scheme to diminish need not provide for unconditional compensation or a fixed sum to be paid to the Indians for land to be detached from the reservation. *Solem*, 465 U.S. at 471; *Rosebud*, 430 U.S. at 596 n.18. Nor must a scheme to diminish provide for Indian consent. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Solem*, 465 U.S. at 470 n.11; *Rosebud*, 430 U.S. at 587.

Statutory language that merely provides for allotments to be made to the Indians and "opens" the remaining reservation lands to settlement by non-Indians does not demonstrate a congressional intent to diminish the boundaries of a reservation. *Rosebud*, 430 U.S. at 586-87; *Mattz v. Arnett*, 412 U.S. 481, 497 (1973); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 355-58 (1962).

Cession-type language has, however, been held in several cases to establish the requisite intent to diminish. In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the statute at issue ratified an agreement between the United States and the Sisseton and Wahpeton bands of Sioux Indians whereby the Indians agreed to "'cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in'" the unallotted lands of the Reservation. The Court held that this language was precisely suited to termination of the Reservation boundaries. *Id.* at 445. Similarly, in *Rosebud*, the Court held that cession-type language in a 1904 Act pertaining to a part of the Sioux Reservation manifested a congressional intent to disestablish, even though the cession language was technically misused in that it implied a bilateral agreement and Congress had acted unilaterally in diminishing the Reservation. *Rosebud*, 430 U.S. at 587-88.

Statutory language that opens reservation lands to public entry and "restores" those lands to the "public domain" has also been recognized in a number of Supreme Court cases to effectuate a diminishment of reservation boundaries as to such lands. In *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 354 (1962), the Court stated that an 1892 Act that "vacated and restored to the public domain" the north half of the Colville Indian Reservation diminished the boundaries as to that part of the Reservation.[12] By contrast, the 1906 Act directly at issue in *Seymour* merely opened the south half of the Reservation to public entry. Because the 1906 Act contained no language restoring the land to the public domain, there was no diminishment as to the south half. Thus, the premise of the opinion in *Seymour* was that restoration of reservation land to the public domain constitutes a diminishment.

In *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), the issue was whether the United States had to pay the Indians compensation for lands that had been added to the Sioux Reservation for Indian use by executive order and later detached from the Reservation and "restored to the public domain," by executive order. An implicit assumption of the opinion is that the land restored to the public domain was no longer subject to tribal jurisdiction and had been detached from the Reservation.

In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), the Court recognized in dicta that the Act of March 2, 1889, 25 Stat. 896, which "restored to the public domain" a portion of the lands of the Great Sioux Reservation, terminated the Reservation as to those lands. 430 U.S. at 589 & n.5. Even Justice Marshall, who argued in a dissent that the Act at issue in *Rosebud* lacked an express indication of congressional intent to diminish, recognized that the language of the Act of March 2, 1889, disestablished the Reservation. He stated, "The very Act that created the Rosebud Reservation provides yet another example [of language effecting a diminishment], for in that Act Congress expressly 'restored to the public domain' part of the Great Sioux Reservation. Act of Mar. 2, 1889, §21, 25 Stat. 896." *Id.* at 618 (Marshall, J., dissenting).

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Court held that the Lake Traverse Reservation in South Dakota was diminished on the basis of cession-type language, but stated the issue to be whether the Reservation "was terminated and returned to the public domain by the Act of March 3, 1891, c.543, 26 Stat. 1035." In other words, land that was "returned to the public domain" was considered no longer subject to tribal jurisdiction. Indeed, the Court referred to the 1892 Act in *Seymour*, which, as noted above, disestablished the north half of the Colville Reservation by vacating and restoring it "to the public domain," and compared it with the 1906 Act in *Seymour* that merely "opened" the south half of the Reservation, but did not disestablish it, and concluded that the 1891 Act at issue was analogous to the 1892 Act in *Seymour*. 420 U.S. at 448-49.

The Supreme Court's latest discussion of "public domain" language is found in *Solem v. Bartlett*, 465 U.S. 463 (1984). The Court acknowledged that in the act at issue a reference to the opened areas as being in "the public domain" gave support to the argument for diminishment. The public domain language in *Solem* was located in an isolated section of the Act, was used only in a descriptive manner, and did not purport to restore any land to the public domain.[13] Because that phrase was not an operative provision of the Act, the Court concluded that it did not indicate congressional intent to diminish. *Solem*, 465 U.S. 474-75.

We have encountered only one case that stands contrary to these Supreme Court decisions on the effect of restoration language. *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986), held that neither the Uintah-Ouray Reservation nor the adjacent Umcompahgre Reservation had been disestablished or diminished. The majority addressed the effect of restoration language, however, only with respect to the Uncompaghre Reservation. The court, relying on a construction of *Solem* later rejected by a panel of the Tenth Circuit, concluded that "the phrase 'restore to the public domain' is not the same as a congressional state of mind to disestablish. In other words, it doesn't disturb the ownership of the land by the tribal group." 773 F.2d at 1092. In reaching this conclusion, the lead opinion wholly ignored the teachings of *Seymour*, *Sioux Tribe*, *Rosebud*, *DeCoteau*, and the authorities cited in Justice Marshall's dissent in *Rosebud*. With respect to the Uintah Reservation, *Ute Indian Tribe* held that the terms of the 1905 Act alone governed the status of that Reservation and that the 1905 Act, which had no restoration language, did not diminish the Reservation. 773 F.2d at 1089; *id.* at 1093 (Seymour, J., concurring). The court stated that the 1902 and intervening Acts did not reveal a "'baseline purpose of disestablishment' that carried through into the 1905 Act." 773 F.2d at 1089.

After the decision in *Ute Indian Tribe* was rendered, a panel of the Tenth Circuit in *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1397-1404 (10th Cir.), *cert. denied*, 111 S. Ct. 581 (1990), revisited the issue of the legal meaning of the phrase "restore to the public domain" and held that when used as operative statutory language, the phrase extinguishes reservation boundaries as to that land restored to the public domain. We set out an extended portion of the court's analysis of the legal effect of restoration language, an analysis not undertaken in *Ute Indian Tribe*:

> [R]ecent Supreme Court cases assume in dicta that congressional restoration language extinguished boundaries. *Mattz v. Arnett*, 412 U.S. 481, 490, 93 S.Ct. 2245, 2250, 37 L.Ed.2d 92 (1973), cites language from the Indian Appropriations Act of July 27, 1868, ch. CCXLVIII, 15 Stat. 198, 223, (Congress restored Mendocino Reservation lands "to the public lands") as clear and sufficient language of extinguishment of reservation boundaries. Similarly, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589 n.5, 600, 97 S.Ct. 1361, 1364 n.5, 1370, 51 L.Ed.2d 660 (1977), accepted restoration language in the Act of March 2, 1889, ch. 405, § 21, 25 Stat. 888, 896 (portion of the Great Sioux Reservation "restored to the public domain") as language demonstrating congressional intent to extinguish prior boundaries. Even Justice Marshall's dissent in *Rosebud* acknowledges that section twenty-one of the Act of March 2, 1889 expressly disestablished part of the Great Sioux Reservation by restoring it to the public domain. *Rosebud Sioux Tribe*, 430 U.S. at 618, 97 S.Ct. at 1379 (Marshall, J., dissenting). Furthermore, in *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), Justice White's majority opinion (holding that cession of Lake Traverse Indian Reservation lands disestablished the reservation boundaries) assumed that restoration language was the equivalent of extinguishment of reservation status for the lands affected. The Court stated: "That the lands ceded . . . were *returned to the public domain, stripped of reservation status*, can hardly be questioned. . . . The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.'" *DeCoteau*, 420 U.S. at 446, 95 S.Ct. at 1094 (emphasis added).
>
> Other Supreme Court cases suggest that affected Indian Tribes understood EO [executive order] restoration language to be language cancelling former EOs. In *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942), the Sioux sought compensation for the value of lands "restored to the public domain" but did not contest in that action, or any other of which we are aware, the fact that whatever Tribal interest had been created by additions to the Great Sioux Reservation under EOs of 1875 and 1876 had been terminated by the restoration language of the subsequent EOs of 1879 and 1884. (The Court itself viewed such language as the equivalent of "cancelling or revoking" an EO establishing a Reservation or adding thereto. *Sioux*, 316 U.S. at 330, 62 S.Ct. at 1101.) *See also Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176, 67 S.Ct. 650, 653, 91 L.Ed. 823 (1947).
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> Evidence that lower courts have accepted the view that restoration language is synonymous with extinction of reservation status is found in *Russ v. Wilkins*, 410 F.Supp. 579 (N.D. Cal. 1976). "On many occasions Congress has unilaterally terminated sections of reservations by restoring them to the public domain. . . . The Act of 1873 [pertaining to the Round Valley Reservation in California] specifically 'restored to the public lands' the 12,000 acres it severed from the Reservation." *Id.* at 581. The court found that a subsequent 1905 act failing to employ

restoration language did not terminate the reservation in question.

In summary, federal court cases reveal that neither Congress, the courts, nor Indian tribes themselves have insisted that restoration language be accompanied by more explicit cancellation language. Rather, they have used or accepted simple, operative restoration language as language of reservation termination in many situations. We have found no case where operative restoration language was not accepted as language of termination.

*Yazzie*, 909 F.2d at 1402-04 (footnotes omitted). In *Yazzie*, the court criticized the conclusion in *Ute Indian Tribe* that the phrase "restore to the public domain" is not the same as a congressional state of mind to disestablish, and characterized it as "unexamined and unsupported." *Id.* at 1400. *Yazzie* clearly departs from the court's prior conclusion in *Ute Indian Tribe* as to the effect of restoration language. Indeed, *Yazzie* held that the use of operative restoration language diminishes a reservation as to the land restored to the public domain.

*Yazzie* is consistent with a long line of lower federal court and state court decisions. *See, e.g., Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 90 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977); *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 687-88 (8th Cir. 1973); *DeMarrias v. South Dakota*, 319 F.2d 845, 846 (8th Cir. 1963); *Russ v. Wilkins*, 624 F.2d 914-15, 924, 927-29 (9th Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 696 (9th Cir. 1976); *see also United States ex rel. Cook v. Parkinson*, 525 F.2d 120, 124 (8th Cir. 1975), *cert. denied*, 430 U.S. 982 (1977); *Putnam v. United States*, 248 F.2d 292, 295 (8th Cir. 1957); *Russ v. Wilkins*, 410 F. Supp. 579, 581 (N.D. Cal. 1976), *rev'd on other grounds*, 624 F.2d 914 (9th Cir. 1980); *United States ex rel. Condon v. Erickson*, 344 F. Supp. 777, 778 (D.S.D. 1972), *aff'd*, 478 F.2d 684 (8th Cir. 1973); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1005 (D. Minn. 1971); *Lafferty v. State*, 125 N.W.2d 171, 174 (S.D. 1963).

On the basis of the above, we conclude that operative statutory language that restores reservation land to the public domain is persuasive evidence of congressional intent to diminish the reservation as to the land so restored.

*B. Whether the Unallotted Lands Were Restored to the Public Domain Pursuant to the 1902 and 1905 Acts of Congress*

Provisions in four statutes, the Indian Appropriation Acts of 1902, 1903, 1904, and 1905, dealt with the opening of the Uintah-Ouray Reservation. The next issue is whether, as a matter of statutory construction, the provision in the 1902 Act which stated that unallotted reservation lands would be "restored to the public domain" remain in effect when the Reservation was finally opened by a presidential proclamation in 1905. That issue turns on the language of the Acts in question.

For the reasons that follow, we hold that as a matter of statutory construction, the 1905 Act was merely amendatory and supplementary to the 1902 Act and therefore did not accomplish the opening of the Reservation independent of the 1902 Act. By way of a brief overview, we note that the pertinent statutes, legislative history, and contemporaneous and subsequent congressional, executive, and judicial constructions of the 1902 and 1905 Acts all show that the 1902 Act was considered the basic statute dealing with the opening of the Reservation and that the subsequent Acts did not repeal the 1902 Act's restoration language.

*1. Establishment of the Uintah Reservation*

The Indians who settled on the Uintah-Ouray Reservation consisted of several bands originally living in an area that included parts of what are now Colorado, Utah, and New Mexico. The Uintah Valley in eastern Utah was "set apart and reserved for the use and occupancy of Indian tribes" pursuant to an executive order issued by President Lincoln in 1861. I Kappler 900. In 1864, Congress authorized the Superintendent of Indian Affairs to bring together and settle in the Uintah Valley as many of the Indians living in the Utah Territory as practicable. Act of May 5, 1864, ch. 77, 13 Stat. 63. The Act set apart the Uintah Valley "for permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." Thus, the Reservation was neither created by treaty nor established for a specific tribe. Indeed, several different bands of Indians settled on the Reservation.

In 1888, the year after the enactment of the General Allotment Act, Congress, with the consent of the Indians, diminished the Uintah-Ouray Reservation by providing that approximately 7,000 acres, known as the Gilsonite Strip, were "to be public lands of the United States and restored to the public domain." Act of May 24, 1888, ch. 310, 25 Stat. 157. This Act concededly had the effect of diminishing the Reservation's boundaries. The United States District Court for the District of Utah so held in *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072, 1099 (D. Utah 1981), and the Tribe did not appeal that ruling.

Congress first sought to open the Uintah Reservation to non-Indian settlement by the Indian Appropriations Act of 1894. Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-38. The 1894 Act directed a commission to negotiate with the Indians for the "relinquishment to the United States" of lands not needed for allotments.[14] No agreement, however, was forthcoming. In 1898, Congress provided for the "cession" of unallotted Indian lands on the Uintah-Ouray Reservation to the United States, subject to the consent of the Indians. Act of June 4, 1898, ch. 3, 30 Stat. 429. Again, because of Indian resistance, the purpose of this Act was not accomplished.





*2. The Indian Appropriations Acts of 1902, 1903, 1904, and 1905*

The Indian Appropriations Act of 1902 provided a comprehensive and detailed scheme for opening the Reservation. Act of May 27, 1902, ch. 888, 32 Stat. 245. In summary, the Act provided that (1) Indian consent was to be obtained; (2) allotments were to be made to the members of the Uintah and White River Tribes of Ute Indians, with 80 acres of irrigable, agricultural Reservation land allotted to each "head of the family" and 40 acres of such land allotted to each "other member of said tribes;" (3) the allotments were to be made prior to October 1, 1903; (4) all unallotted lands were to be "restored to the public domain" on October 1, 1903; (5) land opened for public entry under the homestead laws would be sold for $1.25 per acre; (6) the proceeds from the "sale of the lands so restored to the public domain" would be used first to reimburse the United States for money advanced to the Indians to effectuate the provisions of the Act and then for the benefit of the Uintah and White River Ute Indians; and (7) persons or companies having then-existing mineral leases approved by the Secretary of the Interior or permits to negotiate with the Indians for mineral leases on the Reservation were to have a preferential right, in lieu of such a lease or permit, to locate 640 acres of contiguous mining land under the mining laws up to "thirty days before said lands are restored to the public domain." It is important to note that the date fixed by the 1902 Act for restoring the unallotted lands to the public domain was also the date for opening the unallotted lands to public entry and for completing the allotments of land to the Indians. Thus, the same date was critical to all three interrelated events.

The 1902 Act provided:

> That *the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall be caused to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further*, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and *the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians.*

(Emphasis added.)

Less than a month after enactment of the 1902 Act, a Joint Resolution was passed on June 19, 1902, providing for the establishment of a tribal grazing reserve and for certain allotments of Uintah Reservation lands to be made to Uncompahgre Indians.[15] J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744, 745 (1902). The 1902 Joint Resolution affirmed the proposition that after the allotments were made to the Indians and the grazing reserve was established, the surplus lands were to be restored "to the public domain."[16]

Prior to October 1, 1903, it became apparent that the surveying necessary to make the allotments to the Indians could not be completed and Indian consent would not be forthcoming. Accordingly, Congress enacted the Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-98. That Act specifically amended the 1902 Act in three respects: (1) It dispensed with the requirement that the Indians give their consent to the opening of the Reservation and the allotment program, although their consent was to be initially solicited; (2) it changed the October 1, 1903 date for "opening the unallotted lands to public entry on said Uintah Reservation as provided by the Act of May twenty-seventh nineteen hundred and two" to October 1, 1904; and (3) it provided that the grazing reserve established by the 1902 Joint Resolution should be limited to 250,000 acres and should be located on lands south of the Strawberry River.[17] The provision in the 1903 Act that the allotments to the Indians and the opening of the Reservation would proceed even without Indian consent was apparently based on the United States Supreme Court's decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), decided January 5, 1903, which held that Congress could unilaterally diminish a reservation.[18]

The 1903 Act also appropriated additional funds to pay for the surveying necessary to make the allotments to the Indians under the terms of the 1902 Act. Although the 1903 Act did not itself contain restoration language, it was clearly understood that the restoration language of the 1902 Act remained in effect.

Pursuant to the statutory direction, Indian consent was solicited. The Bureau of Indian Affairs instructed Inspector James McLaughlin to meet with the Indians and explain the provisions of the 1902 and 1903 Acts and, if possible, obtain their consent to the congressional program for the allotment of lands to the Indians and the restoration of the surplus lands to the public domain. *See* Letter from Acting Commissioner of Indian Affairs to James McLaughlin, United States Indian Inspector, at 5 (April 29, 1903). Inspector McLaughlin met with the Indians in May 1903 and explained that the allotments would be made with or without their consent and that the Reservation would be diminished. Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Utah and White River Ute Indians at Uintah Agency, Utah, from May 18 to 23, 1903, at 34-35. He explicitly explained the congressional intent to diminish the Reservation:

> My friends, Red Cap said my talk was cloudy, and you do not understand it. You are the people who are in the dark in regard to the force of this act of congress, and I am trying to bring you into the light. *You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but Congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation. Each of you will have a boundary to your individual holdings and there will also be a border to that 250,000 acre tract set apart for pasturage.*

*Id.* at 42 (emphasis added).

The surveying necessary to make allotments to the Indians could not be completed by October 1, 1904, the date fixed in the 1903 Act for opening the Reservation. As a result, in 1904, Congress amended the 1902 and 1903 Acts and extended the time for making allotments and opening the unallotted lands to entry to March 10, 1905. Act of April 21, 1904, ch. 1402, 33 Stat. 189, 207-08. The 1904 Act also appropriated additional funds to complete the necessary surveying and to "otherwise carry out the purposes of so much of the act of May twenty-seventh, nineteen hundred and two . . . as provides for the allotment of the Indians of the Uintah and White River Utes in Utah."[19] All other terms of the 1902 Act, including the language restoring the unallotted lands to the public domain, were left intact.

Once again, however, the time fixed for making allotments and opening the unallotted lands to public entry could not l[illegible]et. In early 1905, a Senate Resolution directed the Secretary of the Interior to report on the progress that had been made in making the allotments to the Indians under the provisions of the 1902 Act. S. Res., 39 Cong. Rec. 1863 (1905). The Secretary of the Interior responded in a letter, explaining at some length the steps taken "to comply with the provisions of the Act of May 27, 1902" and why the delay in opening the Reservation had occurred. S. Doc. No. 159, 58th Cong., 3d Sess. 1, 2-4 (1905). Attached to the Secretary's letter was a report from the Commissioner of Indian Affairs stating that still more time was necessary to complete the allotment process. *Id.* at 21-22. Because of the delay, the time for completing the allotments and opening the Reservation had to be extended again.

On March 3, 1905, prior to the date fixed for opening the Reservation by the 1904 Act, Congress enacted the Indian Appropriations Act of 1905. Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70. The 1905 Act expressly amended the date fixed by the 1904 Act "for opening to public entry the unallotted lands on the Uintah Reservation" and established September 1, 1905, as the new date "for opening said reservation," but authorized the President to fix the opening at an earlier date.[20] The 1905 Act also repealed a portion of the 1903 Act that limited the location of the grazing reserve to the lands south of the Strawberry River. In addition, the Act added provisions authorizing the President to set apart Reservation lands for an addition to the Uintah Forest Reserve and for protecting the Indians' water supply or for general agricultural development.

Significantly, the language of the 1905 Act did not provide for the opening of the Uintah Reservation--that was done by the 1902 Act. Rather, the 1905 Act merely provided, "*That the time for opening said reservation shall be extended* to the first of September, nineteen hundred and five . . . ," and then specified only "*the manner of opening* . . . ." (Emphasis added.) The position of the Tenth Circuit in *Ute Indian Tribe* that the 1905 Act "opened" the Reservation simply is not, in our view, consistent with the language of the Act. On its face, the 1905 Act merely set a new date for when the opening was to occur and the manner of such opening. The operative statutory language which actually provided for the opening of the unallotted lands was found in the 1902 Act.

Clearly, nothing in the language of the 1905 Act indicates that Congress intended to repeal either the 1902 Act in total or the language of the 1902 Act restoring the unallotted lands to the public domain. Nor is there anything in the legislative history of the 1905 Act to that effect. On the contrary, in enacting the 1905 Act, Congress acted on the premise that the provisions of the 1902 and 1903 Acts and the 1902 Joint Resolution continued in effect. Indeed, with surgical precision, Congress





expressly repe[illegible]a specific, but minor, part of the 1903 Act d[illegible]ding with the location of the grazing reserve.

The language of the 1905 Act shows that Congress intended to amend the 1902 Act only by limiting "the manner of opening" the lands. The Act restricted initial entry on the opened lands to settlement under the homestead and town-site laws for a period of five years; after that, the lands were to be sold for cash in parcels not larger than 640 acres. The purpose of the amendment was to prevent the opened lands from falling into the hands of land speculators and to assure that the opened land would initially be used for agricultural purposes. *See* 39 Cong. Rec. 1185-86 (1905); *Indian Appropriation Bill, 1906: Hearings before the Subcomm. of the Comm. on Indian Affairs of the Senate*, 58th Cong., 3d Sess. 29-30 (1905).

The temporary limitation on the manner of entry under the homestead and town-site laws was patterned after the scheme used in the opening of the Rosebud Reservation. *See* 39 Cong. Rec. 1183 (1905). In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 608 (1977), the Court set out section 2 of the 1907 Act that was at issue there:

> Section 2 provides for the disposition of lands under the "general provisions of the homestead and town-site laws," while §3 specifies land purchase prices, with the proviso that "any lands remaining unsold after the said lands have been opened to entry for seven years may be sold to the highest bidder for cash, without regard to the above minimum limit of price."

The Court saw nothing inconsistent with the diminishment of the Rosebud Sioux Reservation and the provisions temporarily limiting entry into the opened lands. *Id.* at 609. Similarly, in *DeCoteau v. District County Court*, 420 U.S. 425, 442, 449 (1975), the Court held that an 1891 Act terminated the Lake Traverse Indian Reservation despite a provision in the Act opening lands "only to entry and settlement [at $2.50 per acre] under the homestead and townsite laws of the United States."

In sum, the language and legislative history of the 1905 Act show that Congress intended only to amend specific aspects of the 1902, 1903, and 1904 Acts and to provide additional authority to the President to set aside Reservation lands for specific uses. Except as specifically amended, Congress did not intend to change the basic features of the 1902 and 1903 Acts.[21] All language in the earlier Acts not specifically amended or repealed remained part of the statutory scheme dealing with the opening of the Reservation. Thus, after enactment of the 1905 Act, the 1902 Act remained in full force and effect with respect to (1) providing for allotments to heads of households and members of the Uintah and White River Tribes and for the amount of acreage for each allotment; (2) restoring the unallotted lands to the public domain; (3) fixing the price to be paid per acre by home[illegible]aders; (4) providing how and to whose be[illegible] the proceeds derived from the sale of the unallotted lands were to be applied; and (5) protecting certain mineral rights. Of course, the provision in the 1902 Joint Resolution establishing the grazing reserve also remained in effect, although the 1905 Act repealed one minor aspect of the 1903 Act having to do with the location of the reserve.

We conclude that the 1902 Act established the basic statutory authority for opening the Uintah Reservation and that Congress intended thereby to diminish the Reservation. The congressional intent to diminish, as well as other essential aspects of the opening of the Reservation that were established by the 1902 Act, remained in full force and effect through the enactment of the 1902 Joint Resolution and the 1903, 1904, and 1905 Acts. The 1902 Act established more than a "baseline purpose" of restoring unallotted, unreserved lands to the public domain. *See Rosebud*, 430 U.S. at 592. The Act, on its face, provided for the opening of the Uintah Reservation. In short, the restoration language of the 1902 Act was operative statutory language when the opening finally occurred in 1905.

*3. Contemporaneous and Subsequent Construction of the 1902 and 1905 Acts*

The conclusion that the 1902 Act established the basic principles governing the opening of the Uintah Reservation is confirmed by subsequent presidential proclamations, congressional acts, executive department orders, and court decisions.

As stated earlier, the 1905 Act authorized the President to open the Reservation prior to September 1, 1905. The actual opening of the Reservation was effectuated by the Presidential Proclamation of July 14, 1905, 34 Stat. 3119. The Proclamation expressly recognized the continuing operative effect of the 1902 Act and the public domain language therein, as well as the amendatory nature of the 1903, 1904, and 1905 Acts. The Proclamation stated that the time for opening the unallotted lands of the Uintah Reservation had been extended by the 1903, 1904, and 1905 Acts. More importantly, the Proclamation recognized the disestablishment of the Reservation as to the unallotted lands by quoting the language of the 1902 Act that the unallotted lands in the Uintah Reservation "'shall be restored to the public domain.'" The Proclamation also quoted the language in the 1902 Act that fixed the price to be paid for homesteaded land: "'persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre.'"[22] The Proclamation stated in pertinent part:

> *Whereas it was provided by the Act of Congress, approved May 27, A. D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State*

*of Utah, "shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre."*

*And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069)* . . . .

. . . .

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States . . . .

*Id.* at 3119-20 (emphasis added).

By quoting the language from the 1902 Act that "restored" the unallotted land to "the public domain" and fixed the price to be paid per acre by homesteaders, the Proclamation demonstrates that the President deemed both provisions to be operative statutory positions governing the opened lands. The additional citation to the 1903, 1904, and 1905 Acts indicates that the President considered all four Acts relevant to the opening of the Reservation to public entry. The presidential conclusion that the 1902 Act restored the opened land "to the public domain" is an unambiguous and contemporaneous statement by the nation's Chief Executive as to how the 1902 and 1905 Acts should be construed and is therefore entitled to significant weight. *See Rosebud*, 430 U.S. at 602-03.

In addition, the Presidential Proclamation of September 1, 1906, 34 Stat. 3228, confirms the proposition that Congress intended that the unallotted lands be restored to the public domain and that the Reservation be diminished under the 1902 Act. The 1906 Proclamation dealt with a homestead entry that infringed on the Indian grazing reserve established by the 1902 Joint Resolution, as amended by the 1903 and 1905 Acts. The Proclamation adopted essentially the same construction of the operative Acts as the 1905 Proclamation. It implicitly recognized the diminishment of the boundaries of the Reservation by referring to the "former Uintah Indian Reservation in Utah" and by "restor[ing]" a small parcel of land from the grazing reserve "to the public domain" so as to make it subject to entry. The parcel had been erroneously located on a small part of the reserve and had been improved by the homesteader. Had the surplus reservation lands not been restored to the public domain by the 1902 Act, it would have been pointless to transfer the parcel from the grazing reserve to the public domain. The Proclamation stated:

> WHEREAS, the Secretary of the Interior, on July 11, 1905, *under the authority of the act of June 19, 1902 (32 Stats., 744) amended by the act of March 3, 1903 (32 Stats., 982, 998), and March 3, 1905 (33 Stats., 1048, 1069), reserved certain lands in the former Uintah Indian Reservation in Utah*, including Lots 2 and 13 in Sec. 10, T. 2 S., R. 1 E., containing 8.80 acres, for the Uintah Indian Grazing Reserve; and whereas, the President of the United States in his proclamation of July 14, 1905, opening the lands in the said Uintah Reservation to settlement and entry, excepted from such opening the lands included in said grazing reserve; and whereas one David Eskelson was, on September 26, 1905, erroneously allowed to include in his homestead entry No. 806, the said Lots 2 and 13, on which lots he has placed valuable improvements, and which, by virtue of their small area and being entirely segregated from the balance of the grazing reserve by the claims of the Raven Mining Company, are of no value as a part of said reserve:
>
> Now, therefore, I, THEODORE ROOSEVELT, President of the United States, by virtue of the power in me vested, do hereby declare and make known that the *lots numbered 2 and 13 of Section 10, Township 2 S., of Range 1 E., Uintah Special Meridian, in Utah, are hereby restored to the public domain.*

(Emphasis added.)

Congressional enactments after 1905 dealing with the Reservation were also based on the premise that the public domain language in the 1902 Act diminished the Reservation's boundaries. In every instance of which we are aware, the 1903, 1904, and 1905 Acts were viewed as amendatory and supplementary to the 1902 Act and as consistent with the proposition that the opened lands had been restored to the public domain.

A 1906 Act extended the time for homesteaders to establish their residence on the opened lands. Act of January 27, 1906, 34 Stat. 9. The Act specifically referred to the unallotted Uintah Reservation lands as "*heretofore a part of the Uinta Indian Reservation*, within the counties of Uinta and Wasatch, in the State of Utah, *opened under the Acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, and March third, nineteen hundred and five.*" (Emphasis added.) Similarly, in 1912, Congress provided an extension of time to make payment and proof of [illegible] for "any person who has heretofore made a homestead entry *for land which was formerly a part of the Uintah Indian Reservation* in the State of Utah, *authorized by the Act approved May twenty-seventh, nineteen hundred and two, and Acts amendatory thereto* . . . ." Act of July 20, 1912, ch. 244, 37 Stat. 196-97 (emphasis added).

Both the 1906 and the 1912 Acts are similar to a 1905 Act discussed in *Rosebud* that extended the time for settlers to establish homesteads on former lands of the Rosebud Sioux Reservation. That Act referred to "'lands which were *heretofore* a part of the Rosebud Indian Reservation.'" *Rosebud*, 430 U.S. at 603 n.25 (emphasis in original). The Supreme Court characterized this statutory language as "additional evidence of the congressional intent to disestablish." The same conclusion applies here.

The Indian Appropriations Acts of 1910 and 1911 provide still further evidence of diminishment. The 1910 Act appropriated $5000 for the straightening of the Duchesne River "to be reimbursed to the United States out of the proceeds of the sale of lands within the *ceded* Uintah Indian Reservation opened to entry under the Act of May twenty-seventh, nineteen hundred and two." (Emphasis added.) Similarly, the 1911 Act provided $15,000 to build a bridge across the Duchesne River. Act of March 3, 1911, ch. 210, 36 Stat. 1073-74. The funds were to be reimbursed to the United States from the "sale of lands within the *ceded* Uintah Indian Reservation open to entry under the act of May twenty-seventh, nineteen hundred and two." (Emphasis added.) The term "ceded" in the 1910 and 1911 Acts may be technically misused, but in the context of the Acts, the term clearly refers to land that was detached from the Reservation by the 1902 Act. *See Rosebud*, 430 U.S. at 597-98.

The 1910 Act also appropriated funds to pay the Indians for land in the "former Uintah Indian Reservation" that was set apart by the President under the authority of the 1905 Act for reservoir and irrigation purposes in connection with the Strawberry River reclamation project.[23] Act of April 4, 1910, ch. 140, 36 Stat. 284-85. The funds that were to be paid the Indians for this land were to be provided by the owners of the lands irrigated by the project. The 1910 Act also provided, "All right, title, and interest of the Indians in the said lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project." 36 Stat. 285.

The use of extinguishment language in the 1910 Act does not support a conclusion that Congress would have used this type of explicit language of diminishment in the 1902 Act if Congress had intended to diminish the Reservation. The lands that were detached from Indian ownership and jurisdiction under the 1910 Act passed directly from the Reservation as it existed *after* 1905 to a specific type of private use and [illegible] not ever become part of the public domain. [illegible]ed, because of the specified use to which the detached lands were put, it would have been inappropriate to restore those lands to the public domain. For that reason, the more explicit diminishment language in the 1910 Act was necessary.

Statements of executive department officials and congressional committees have also consistently concluded that the opened lands were restored to the public domain by the 1902 Act. In 1911, E. P. Holcombe and James M. McLaughlin filed a report with the Department of the Interior concerning the Uintah Reservation. The report stated that on July 14, 1905, "the President issued a proclamation opening the lands to entry August 28, 1905, . . . and there were restored to the public domain to be disposed for the benefit of the Indians about 1,004,005 acres."[24] H.R. Doc. No. 892, 62d Cong., 2d Sess. 1-2 (1912). A 1941 report of the Senate Committee on Indian Affairs, issued before the 1945 Order of Restoration, discussed *infra*, and before the addition of the Hill Creek Extension, stated:

> The Uintah and Ouray Indian Reservation was established in 1861 for the Uintah, Uncompahgre, and White River Bands of Ute Indians. The original area of the reservation was approximately 2,039,040 acres. Cessions were made to the United States at various times so that at present the reservation embraces but 366,000 acres or less than one-fifth of the original.

S. Rep. No. 243, 77th Cong., 1st Sess. 3 (1941); *see also*, H.R. Rep. No. 2047, 69th Cong., 2d Sess. 2 (1927); H.R. Rep. No. 2503, 82d Cong., 2d Sess. 2, 3 (1952).

Official action of the Secretary of the Interior also provides persuasive evidence of executive department recognition of diminishment. In 1934, Congress authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States . . . ." Act of June 18, 1934, ch. 576, 48 Stat. 984. In 1945, the Secretary of the Interior issued an "Order of Restoration" pursuant to the 1934 Act that restored to the Uintah Reservation 217,000 acres of the undisposed, opened lands that remained in the public domain. That Order restored both the *ownership* of those lands to the Tribe and, by making the lands part of the Reservation, the *tribal jurisdiction* over them. The Order stated:

> Whereas, pursuant to the provisions of the act of May 27, 1902 (32 Stat., 263), as amended, the unallotted lands of the Uintah and Ouray Indian Reservation in the State of Utah, were made subject to disposal under the laws of the United States applying to public lands, and

> Whereas, there are now remaining undisposed of within said area approximately 217,000 acres of unallotted lands, which need closer administrative control in the interest of better conservation practices, and
>
> Whereas, by relinquishment and cancellation of homestead entries within this area a limited additional acreage of land of similar character may later be included within this class of undisposed-of opened land, and
>
> Whereas, the Tribal Council, the Superintendant of the Uintah and Ouray Agency, and the Commissioner of Indian Affairs have recommended restoration to tribal ownership of such undisposed-of surplus unallotted lands in the said reservation,
>
> Now, therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the act of June 18, 1934 (48 Stat. 984), I hereby find that the restoration to tribal ownership of *all lands which are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ouray Reservation* will be in the public interest, and the said lands *are hereby restored to tribal ownership* for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah, *and are added to and made a part of the existing reservation, subject to any valid existing rights.*

Order Notice, 10 Fed. Reg. 12,409 (1945) (emphasis added).

The law is clear that if mere legal title to opened surplus lands passed to non-Indians, such lands remained part of the reservation, and restoring the opened lands to tribal ownership would have no effect on their status as reservation lands, since by definition they never left the reservation. But if tribal boundaries were diminished when the surplus lands were opened, the return of those lands to the reservation would enlarge the boundaries of the reservation. *See Solem*, 465 U.S. at 467-68. Thus, in restoring both the ownership of and the jurisdiction over the lands to the Tribe, the 1945 Order of Restoration was premised squarely on the proposition that the 1902 Act disestablished the Reservation as to the opened lands.

More recent evidence that the restoration language of the 1902 Act was operative at the time of the opening is found in a 1971 order of the Secretary of the Interior revoking a 1930 withdrawal of oil shale lands because the initial withdrawal had clouded title to part of the Uintah Reservation grazing and timber reserve, the allotted lands, and the lands restored to the public domain by the 1902 Act and later restored to the Reservation under the 1945 Order of Restoration. Order Notice, 36 Fed. Reg. 19,920 (1972). The 1971 Order recited the legal history of the Reservation, including the restoration of the "unallotted lands of the Uintah and Ouray Indian Reservation . . . to the public domain." Part of the Order stated:

> Whereas, pursuant to the provisions of the Act of May 27, 1902 (32 Stat. 263), as amended and supplemented by the Acts of March 3, 1903 (32 Stat. 998); April 21, 1904 (33 Stat. 207); March 3, 1905 (33 Stat. 1069); and May 14, 1920 (41 Stat. 599); most of the unallotted lands of the Uintah and Ouray Indian Reservation in Utah were restored to the public domain with the proceeds from the sale of said lands to be used for the benefit of the Indians....

In addition, both the Department of Justice and the Ute Tribe have formally stipulated that the unallotted, opened lands were restored to the public domain by the 1902 Act. In its amicus brief filed in connection with the petition for a writ of certiorari in *Ute Indian Tribe*, the Department noted that both it and the Uintah and White River Bands of Ute Indians had stipulated that the Indians on the Uintah-Ouray Reservation "'received individual allotments thereon pursuant to the Act of May 27, 1902, as amended,' and that surplus lands were 'restored to the public domain' pursuant to the 1902 Act 'and amendments thereto.'"[25] The stipulation was filed with the Court of Claims in conjunction with the litigation in *Uintah and White River Bands of Ute Indians v. United States*, 139 Ct. Cl. 1 (1957).

The Ute Tribe has also acknowledged that the Reservation had been diminished. The Tenth Circuit's panel opinion in *Ute Indian Tribe* stated:

> [T]he 1957 Ute Ten Year Development Program provides a description of the total acreage of the Uintah and Ouray reservation as currently containing 1,010,000 acres. In detail, it delineates, "The original area of the Uintah Reservation in Wasatch, Duchesne and Uintah Counties [was] reduced as follows. . . ." (The document then details the Gilsonite Strip reduction, the 1905 addition to the Uintah Forest Reserve, the Strawberry River reduction, the 1902 grazing reserve and allotments to individual Indians and "[a]pproximately 798,877 acres were disposed of by the United States for cash, or otherwise set aside and taken for its own use at various times since the opening of the reservation in 1905.").

*Ute Indian Tribe v. Utah*, 716 F.2d 1298, 1313 (10th Cir. 1983), *vacated*, 773 F.2d 1087 (10th Cir. 1985) (en banc).

As recently as 1977, the Forest Service took the position that the Ashley and Uintah National Forests and the High Uintah Wilderness were not part of the Reservation because "the original Uintah Reservation boundaries were disestablished and the present Reservation boundaries include only the trust lands."[26] Moreover, Department of Interior officials have consistently viewed only the trust lands (the tribal grazing reserve, allotments, and land later restored to tribal ownership and reservation status) as the lands that lie within the Reservation.[27]

Finally, a number of court decisions have also stated or held that the language in the 1902 Act restoring the unallotted lands to the public domain was operative when the Reservation was opened in 1905 and that the 1905 Act simply extended the time for opening the unallotted, unreserved lands to public entry. In *Sowards v. Meagher*, 37 Utah 212, 108 P. 1112 (1910), the issue was whether an application was properly made to the Utah State Engineer for an award of water rights to be used on land that was opened to public entry in 1905. This Court reviewed the statutes dealing with the opening of the Reservation, beginning with the 1902 Act, and stated:

> It may be judicially noticed, and here stated, that Congress in 1902 ordered the unallotted lands of the Indian reservation referred to in the complaint to be restored to the public domain on the 1st day of August, 1903. That time was extended to October 1, 1904, and again to March 10, 1905. On March 3, 1905, Congress again extended such time to September 1, 1905, but authorized the President of the United States by proclamation to fix an earlier time. Thereupon, the President, on the 14th day of July, 1905, issued a proclamation restoring the unallotted lands of the reservation to the public domain, and declaring such lands open to entry, settlement, and disposition on and after the 28th day of August, 1905.

108 P. at 1114. Although it cannot be said, as a technical matter, that the *Sowards* opinion specifically addressed the question of whether the Reservation was disestablished as to the lands that were returned to the public domain, it is clear that this Court held that the 1905 Act amended the 1902 Act and that the 1902 Act restored the open, unallotted lands to the public domain. *See also White Rocks Irrigation Co. v. Mooseman*, 45 Utah 79, 141 P. 459, 460 (1914).

The Court of Claims' opinion in *Uintah and White River Bands of Ute Indians v. United States*, 139 Ct. Cl. 1 (1957), reached the same conclusion. That case awarded compensation to the Uintah and White River Utes for the withdrawal by the United States of the lands that were set apart and added to the Uintah Forest Reserve pursuant to the 1905 Act. In the course of the opinion, the court stated that after the allotments to the Indians were made, the surplus lands were opened to public entry and the proceeds from these lands totalling $1,184,996.33 were credited to the account of the Uintah and White River Utes. *Id.* at 22. With respect to the 1902 Act, the court stated that "surplus lands (with the exception of forest reserve and reclamation withdrawals and certain mineral entries) were restored to the public domain, and opened for disposition under the public land laws for the benefit of the Indians." *Id.*

The same construction was placed on the 1902 and 1905 Acts by the Court of Appeals for the Tenth Circuit in *Hansen v. United States*, 153 F.2d 162 (10th Cir. 1946). *Hansen* held that the 1902 Act restored the unallotted lands "to the public domain" and that the 1903, 1904, and 1905 Acts "extended the time for opening the unallotted lands to the public domain." *Id.* at 163. This opinion was handed down just a few months after the 1945 Order of Restoration by the Secretary of the Interior and apparently without knowledge of it, for the Court noted, "Approximately 220,000 acres of the lands restored to the public domain by the Act of May 27, 1902, remain undisposed of." *Id.*

In *United States v. Boss*, 160 Fed. 132 (D. Utah 1906), the United States District Court for the District of Utah dismissed an indictment which charged that the defendant knowingly introduced intoxicating liquor into Indian country in violation of federal law. The crime had occurred after the opening of the Uintah Reservation in 1905 on unallotted land that had been reserved by the Secretary of the Interior for school and Uintah Agency purposes. The court traced the legislative history of the Uintah Reservation, including the interdependence of the 1902 and 1905 Acts, and found *Ex parte Dick*, 141 Fed. 5 (9th Cir. 1905), *rev'd on other grounds*, 202 U.S. 132 (1906), dispositive. In *Dick*, the Ninth Circuit vacated the federal conviction of a defendant for knowingly introducing intoxicating liquor into Indian country because the crime had occurred on land over which the state had exclusive jurisdiction. The sale of liquor in *Dick* occurred on Nez Perce Reservation land that had been ceded to the United States by a congressional act and sold to a municipal corporation. The court concluded, "In the present case, the sale of liquor was made in a municipal territory clearly within the jurisdiction of the state, and outside the jurisdiction of the United States." *Dick*, 141 Fed. at 8. Thus, *Boss*'s dismissal of the indictment for lack of federal jurisdiction and its reliance on *Dick* implicitly acknowledged that the unallotted lands of the Uintah Reservation had been restored to the public domain and were therefore subject to the state's exclusive jurisdiction. *See also United States v. Fitzgerald*, 201 Fed. 295, 296 (8th Cir. 1912) (referring to "the former Uintah Indian Reservation").

In sum, Congress, the President, executive department agencies, including the Department of Justice, the Department of the Interior, the Bureau of Indian Affairs, and the Forest Service, the courts, and the Ute Tribe itself have acted on the premise that the restoration language in the 1902 Act restored the unallotted, surplus land in the Uintah-Ouray Indian Reservation to the public domain when the Reservation was finally opened in 1905 and diminished the Reservation as to that land.

## III. CONCLUSION

The 1902, 1903, 1904, and 1905 Acts, carefully analyzed, require the conclusion that the restoration language in the 1902 Act continued in operative effect as part of the scheme for opening the Reservation and that the 1905 Act simply amended and supplemented the 1902 Act. The 1905 Act did not restate the proposition that the unallotted, unreserved lands were restored to the public domain. Nor did it restate several other legal principles established in the 1902 Act that also governed the opening of the Reservation. As an act that amended and supplemented the 1902 Act, there was no need for the 1905 Act to restate that which was already established. Simply stated, the 1905 Act did not stand alone in opening the Reservation; it only extended the time for opening the Reservation under the 1902 Act and provided for the manner of the opening. The fact that the 1905 Act allowed settlement on the opened lands only under the homestead and town-site acts for a period of five years does not compel a different conclusion, nor does the fact that the Uintah and White River Utes were not paid a sum certain for the opened lands. Because the restoration language in the 1902 Act was never repealed, it remained in effect, and the Reservation was diminished. This case cannot therefore be disposed of under the rulings in *Rosebud*, *Mattz*, and *Seymour* that surplus land acts that simply "open" reservation lands to entry by non-Indians do not diminish the reservation.

In conclusion, we hold that the unallotted, unreserved lands of the Uintah Reservation were restored to the public domain by the 1902 Act, as amended by the 1903, 1904, and 1905 Acts, and that the Reservation boundaries were diminished by that restoration. The Reservation boundaries were further diminished by the withdrawal for the Strawberry River reclamation project and later enlarged by the 1945 Order of Restoration and the 1948 Hill Creek Extension.[28] Since Myton, Utah, lies outside the boundaries of the Reservation so described, it is not within Indian country. Therefore, the district court had subject matter jurisdiction over the burglary and the prosecution of Clinton Perank.

Affirmed.

WE CONCUR:

Gordon R. Hall, Chief Justice

Richard C. Howe, Associate, Chief Justice

Christine M. Durham, Justice

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1. Appellate jurisdiction of this case would ordinarily lie with the Utah Court of Appeals. *See* Utah Code Ann. §78-2a-3(2)(f) (Supp. 1988). Because of the importance of the question presented, the Court of Appeals certified the case to this Court.

2. The Department of Justice in its amicus brief failed to recognize that the Tenth Circuit's *en banc* decision in *Ute Indian Tribe* was in conflict with prior decisions of this Court. *See Sowards v. Meagher*, 37 Utah 212, 108 P. 1112 (1910); *White Rocks Irrigation Co. v. Mooseman*, 45 Utah 79, 141 P. 459 (1914). The Department referred only to *Brough v. Appawara*, 553 P.2d 934 (Utah 1976), which was vacated and remanded for further consideration. *Brough v. Appawara*, 431 U.S. 901 (1977). No further opinion was rendered by this Court in *Brough*. The Department's brief stated, "If the Utah Supreme Court nevertheless should adhere to its prior view in some future case, notwithstanding the intervening decision in *Solem* and the exhaustive consideration of the issue by the courts below, there will be time enough for this Court to grant review." Brief for the United States in opposition as Amicus Curiae, *Utah v. Ute Indian Tribe*, on petition for writ of certiorari to United States Court of Appeals for the Tenth Circuit, No. 85-1821, October Term 1986, at 14-15.

3. Res judicata is an affirmative defense in both criminal and civil cases and therefore is waivable. *See* Utah R. Civ. P. 8(c), 12(h); *Rothey v. Walker Bank & Trust Co.*, 754 P.2d 1222, 1225 (Utah 1988); *Manger v. Davis*, 619 P.2d 687, 692 (Utah 1980); *Jackson v. Rich*, 499 P.2d 279, 280 (Utah 1972); *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959); *Louisville v. Nashville R.R. v. M/V Bayou Lacombe*, 579 F.2d 496, 471 n.1 (5th Cir. 1979); *Parks v. Pavkovic*, 753 F.2d 1397, 1404 (7th Cir. 1985); *State v. Hall*, 383 P.2d 602, 611-12 (Idaho 1963). Even if the defense had been been raised in this case, its application against the State of Utah would be problematic. Although we have held that collateral estoppel does not require mutuality of parties when used defensively against private litigants, *see Robertson v. Campbell*, 674 P.2d 1226, 1230 (Utah 1983); *Searle Brothers v. Searle*, 588 P.2d 689, 690-91 (Utah 1978), we have not decided whether the doctrine of nonmutual collateral estoppel applies against the State. Federal law generally requires full mutuality of parties when collateral estoppel is applied against the government. *See United States v. Mendoza*, 464 U.S. 154 (1984); *see also United States v. Stauffer Chemical Co.*, 464 U.S. 165, 169 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980); *Montana v. United States*, 440 U.S. 147, 155-62 (1979); *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948). Nonmutual collateral estoppel does not apply against the government because of overriding policy considerations. *Mendoza*, 464 U.S. at 163-64. The rule requiring full mutuality of parties has also been required with respect to estopping state governments. *See Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558, 1577-82 (11th Cir. 1985). *See generally* Restatement (Second) of Judgments §28 (1982); 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* §4425 (1981 & Supp. 1992). As the Utah cases cited in footnote 2 indicate, the issue of reservation diminishment can arise in a number of civil contexts in which the State of Utah is not a party, and rather than delay a decision on an issue of such substantial public importance that will inevitably recur, we think it appropriate to address the diminishment question, even if res judicata were otherwise applicable against the State.

4. A complex set of rules governs criminal jurisdiction in Indian country. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* 34-38, 286-304, 335-41 (1982); Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503 (1976); Scott W. Wilson, *Criminal Jurisdiction in Montana Indian Country*, 47 Mont. L. Rev. 513 (1986); Paul S. Volk, Note, *The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction Over Crimes By and Against Reservation Indians*, 20 New Eng. L. Rev. 247 (1984-85); K. Bliss Adams, Note, *Order in the Courts: Resolution of Tribal/State Criminal Jurisdictional Disputes*, 24 Tulsa L.J. 89 (1988).

5. Section 1152 of the United States Code provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Section 1153 of the Code provides:

> Any Indian who commits against the person or property of another Indian or another person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.
>
> In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

6. While federal criminal statutes do not define the term "Indian," 25 U.S.C. §479 (1983) defines Indian for the purposes of land ownership and allotment:

> The term "Indian" as used in [various sections of Subchapter V—Protection of Indians and Conservation of Resources] shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

Perank would be considered an Indian under this provision because he has one-half or more Indian blood. The definition of the term "Indian" may vary, however, depending on the context for which Indian identity is relevant. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 19-20 (1982).

7. We take judicial notice of the Tribal Constitution pursuant to Rule 20(b) of the Utah Rules of Evidence. This provision of the Constitution was amended in 1988.

8. These facts are taken from affidavits of Perank's parents submitted in the revocation proceeding.

9. 18 U.S.C. §1152 precludes the exercise of state jurisdiction over crimes committed by Indians in Indian country, and section 1151 defines Indian country to include all land within a reservation. *See supra* note 5.

10. In 1902, the Uintah Reservation contained approximately 2,039,040 acres. The federal government in 1905 withdrew 1,010,000 acres as an addition to the Uintah National Forest. The allotments to individual Indians under the 1902 Act and the lands reserved for grazing and other purposes set aside for the Tribe by a 1902 Joint Resolution and the 1903 and 1905 Acts make up approximately 360,000 acres. An executive "Order of Restoration" under the authority of the Act of June 18, 1934, 48 Stat. 984, restored to the Tribe in 1945 both the title and tribal jurisdiction to over 217,000 acres that had been previously opened and restored to the public domain in 1905. This Order is discussed later in the text. In 1948, Congress added to the Uintah Reservation the Hill Creek Extension, which contained approximately 510,000 acres of the former Uncompahgre Reservation. At present, the Uintah Reservation, including the trust lands, the lands restored to tribal jurisdiction by the Order of Restoration, and the lands added to the Reservation by the Hill Creek Extension, total approximately 1,087,000 acres. If the 1,010,000 acres of Reservation land that were set apart as an addition to the Uintah Forest Reserve but held to be part of the Reservation in *Ute Indian Tribe* are added to the 1,087,000 acres, the Reservation today is larger than it was in 1902, before the restoration of the unallotted lands to the public domain.

There are approximately 1,500 enrolled members of the Ute Tribe. *Ute Indian Tribe*, 773 F.2d at 1105 (Seth, J., dissenting). The tribal seat of government is located at Fort Duchesne, Utah, which is located on trust lands. Most of the lands opened for settlement under the 1905 Act were in Duchesne County. Some 18,000 non-Indians now live in the area that the State asserts was disestablished, and only about 300 Indians, not all of whom are members of the Ute Tribe, live in that same area. The two towns where the bulk of the non-Indian population reside, Roosevelt and Duchesne, are in the disputed area that the State contends is not subject to tribal jurisdiction. Myton is also in that area.

11. In his dissent in *Rosebud*, Justice Marshall cited four specific examples of clear language of express termination: (1) "'the Smith River reservation is hereby discontinued'"; (2) "'a portion of the Colville Indian Reservation . . . is hereby, vacated and restored to the public domain'"; (3) "'the reservation lines of the said Ponca and Otoe and Missouria Indian Reservation . . . are hereby abolished'"; and (4) part of the Great Sioux Reservation was "'restored to the public domain.'" *Rosebud*, 430 U.S. at 618 (Marshall, J., dissenting). In addition, Justice Marshall noted that an Indian library compilation contained eleven additional examples of express termination language taken from statutes enacted between 1888-1913. *Id.* at 618 n.3.

12. Act of July 1, 1892, ch. 140, 27 Stat. 62, 63.

13. The Act in question, the Cheyenne River Act, contained nine sections and spanned three and one-half

pages in the statutes at large. Act of May 27, 1908, ch. 218, 35 Stat. 460-64. The operative language of the Act was found in the first sentence of the first section. 35 Stat. 460; *Solem*, 464 U.S. at 472-73. The reference to "public domain" was found in the second proviso of the ninth section, or the last sentence of the Act. It was couched in the context of the Indians' right to use timber on particular sections of the lands to be opened:

> *Provided*, That Indians residing upon their allotments in townships sixteen north of ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one east shall have the right to use timber in said townships, except on sections sixteen and thirty-six for domestic purposes only as long as the lands remain part of the public domain.

35 Stat. 464. Unlike the instant case, this reference to public domain was clearly not the operative language of the Act.

**14.** The 1894 Act also began the opening process on the neighboring Uncompahgre Reservation. The Act provided for a commission to determine which lands on the Uncompahgre Reservation were unsuited or not required for allotments so that such lands could be "restored to the public domain and made subject to entry . . . ." Pursuant to the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87, Congress mandated the allotment and opening of the Uncompahgre Reservation. *See Ute Indian Tribe*, 521 F. Supp. at 1105-10. We do not address the issue of whether the Uncompaghre Reservation has been disestablished. The Tenth Circuit held that it was not. *Ute Indian Tribe*, 772 F.2d at 1090-93; *id.* at 1093-99 (Seymour, J., concurring).

**15.** Although the 1902 Joint Resolution provided for allotments on the Uintah Reservation to Uncompahgre Utes, the Uncompahgre Utes did not share in the proceeds from the opened lands.

**16.** The 1902 Joint Resolution provided in part:

> In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.
>
> All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to each head of a family and forty acres to each other Indian, and no more. The grazing land selected and set apart, as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named.
>
> . . . .
>
> *The item of seventy thousand and sixty-four dollars and forty-eight cents* appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, *shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoratio[n] [t]he surplus lands to the public domain.*

(Emphasis added.)

**17.** The 1903 Act stated in pertinent part:

> To enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the purpose of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Walker River Reservation in Nevada, and the Uintah and White River Utes in Utah, and the joint resolution of June nineteenth, nineteen hundred and two, providing for the allotment of the Indians of Spokane Reservation in Washington, to be immediately available, one hundred and seventy-five thousand dollars: *Provided, however*, That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act: *And provided further*, That the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not exceed two hundred and fifty thousand acres: *And provided further*, That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May twenty-seventh, nineteen hundred and two, be, and the same is hereby, extended to October first, nineteen hundred and four.

**18.** In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587-88 (1977), the Supreme Court specifically relied on *Lone Wolf* in holding that the absence of Indian consent did not defeat congressional intent to diminish or disestablish a reservation. *See also Solem v. Bartlett*, 465 U.S. 463, 471 n.11 (1984).

**19.** The 1904 Act provided in its entirety:

> That the time for opening the unallotted lands to public entry on the Uintah Reservation, in Utah, as provided by the acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, be, and the same is hereby, extended to March tenth, nineteen hundred and five, and five thousand dollars is hereby appropriated to enable the Secretary of the Interior to do the necessary surveying, and otherwise carry out the purposes of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Uintah and White River Utes in Utah.

**20.** The pertinent part of the 1905 Act provided:

> That so much of the act of March third, nineteen hundred and three, as provides that the grazing lands [t]o be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.
>
> *That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five*, unless the President shall determine that the same may be opened at an earlier date and *that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows*: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *And provided further*, That all lands opened to settlement and entry under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the act of Congress of May twenty-seventh, nineteen hundred and two, and the acts amendatory thereof and supplemental thereto.
>
> That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided*, That the proceeds from any timber on such addition as may wit[h]in safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.

(Emphasis added.)

**21.** Unlike the 1902 and 1903 Acts, the 1904 Act added nothing substantive to the overall statutory scheme. It only extended the time for the opening.

**22.** That the 1905 Act failed to fix a specific price to be paid for opened lands does not militate against diminishment. *See Solem*, 465 U.S. at 471; *Rosebud*, 430 U.S. at 596 n.18.

**23.** Pursuant to the authority of the 1905 Act, the President withdrew 56,000 acres for the Strawberry River reclamation project. Presidential Proclamation of August 3, 1905, 34 Stat. 3141. This withdrawal diminished the Reservation. *See Ute Indian Tribe*, 716 F.2d at 1314, *rev'd on other grounds*, 773 F.2d 1087.

**24.** We note that this acreage figure is difficult to reconcile with other figures in this opinion dealing with the amount of land restored to the public domain, *see supra* at 8-9 & n.10, and appears inaccurate.

**25.** Brief of the United States in opposition as Amicus Curiae, *Utah v. Ute Indian Tribe*, on petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit, No. 85-1821, October Term 1986, at 13 n.7, *cert. denied*, 479 U.S. 994 (1986). The Department of Justice stated in its amicus brief, "The quoted passages do not suggest that the 1902 Act was the sole basis for allotment and opening; to the contrary, they make clear that the substantive provisions of the 1902 Act were 'amended.'" That point, however, has never been contested. What is significant is that the Department formally acknowledged in court that the surplus lands had been restored to the public domain pursuant to the 1902 Act and the amendments thereto.

**26.** Brief of Duchesne and Uintah Counties as Amici Curiae, at 16 (quoting Letter from United States Forest Service to Scott M. Matheson, Governor of Utah (April 8, 1977)).

**27.** H.R. Rep. No. 5010, 59th Cong., 1st Sess. 1-2 (1906); Letter from C. F. Darrabee, Acting Commissioner of Office of Indian Affairs to H. C. Means, Superintendent of Irrigation Survey, Whiterocks, Utah 1-2 (September 26, 1907); Letter from First Assistant Secretary of Department of the Interior to Commissioner of Indian Affairs (November 8, 1907); Letter from Secretary of the Department of the Interior to Secretary of the Treasury (December 19, 1908); 1929 Annual Report of Uintah and Ouray Agency, Fort Duchesne, Utah 1; 1931 Annual Report of Uintah and Ouray Agency, Fort Duchesne, Utah 4-6; 1932 Annual Report of Uintah and Ouray Agency, Fort Duchesne, Utah 1-2; Bureau of Indian Affairs, Phoenix Area Office, *Information Profiles of Indian Reservations in Arizona, Nevada, & Utah* 155 (1976).

**28.** We do not address the issue of whether the 1905 addition to the Uintah National Forest diminished the Reservation. The Tenth Circuit *en banc* decision in *Ute Indian Tribe* held that it was not thereby diminished, 773 F.2d at 1089-90; *id.* at 1099-1101 (Seymour, J., concurring), whereas that court's panel decision and the decision of the United States District Court for the District of Utah held otherwise. 716 F.2d at 1313-14; 521 F. Supp. at 1136-37. It is significant to note that the 1905 Act, which granted the President the authority to reserve unallotted lands in the Reservation as an addition to the Uintah Forest Reserve, specifically provided that such lands would

be "subject to the laws, rules, and regulations governing forest reserves . . . ." 33 Stat. 1070. The full text of the statute is set out at n.20 *supra*. It was pursuant to this statutory authority that President Roosevelt withdrew 1,010,000 acres from the Uintah Reservation for the national forest by the Proclamation of July 14, 1905, 34 Stat. 3116. The administrative authority over these lands was transferred from the Secretary of the Interior and the Bureau of Indian Affairs to the Secretary of Agriculture pursuant to the Act of February 1, 1905, ch. 288, 33 Stat. 628, and subjected to the jurisdiction of the Forest Service. In his dissenting opinion in *Ute Indian Tribe*, 773 F.2d at 1115, Judge Seth stated that Congress clearly evidenced an intent to remove the lands from the Reservation by the transfer of reservation status and administrative authority. *See also United States v. Gemmell*, 535 F.2d 1145, 1149 (9th Cir. 1976) (continuous use of forest land for conservation and recreation strongly suggests extinguishment of Indians' title). The Utes were paid $1,217,000 in compensation for the forest reserve lands. *See Uintah and White River Bands of Ute Indians v. United States*, 139 Ct. Cl. 1, 7, 27-29 (1957).

*ZIMMERMAN, Justice*: (Dissenting)

I dissent. I cannot join the majority in interpreting a federal statute that affects the boundaries of the Uintah-Ouray Indian Reservation in a way which contradicts the construction approved by a majority of the entire United States Court of Appeals for the Tenth Circuit. I find almost incredible the refusal of the majority of this court to accord comity to a federal court's decision in an area in which the federal government has preeminent authority and a unique trust responsibility. A majority of this court has given the State of Utah what it has desperately sought for six years--a second shot at persuading the United States Supreme Court to reject the Tenth Circuit's ruling and to give Utah control over a large part of the original reservation. This litigation certainly will not end here, now that there is a square conflict between the entire Tenth Circuit and this court. But this tactical victory for the State comes at an unacceptably high cost to the relationship between the state and federal judiciaries. Moreover, on the merits, I think the majority reaches the wrong result.

This case arises in the context of Clinton Perank's appeal challenging Utah's assertion of criminal jurisdiction over him. The State has taken advantage of Perank's appeal from a relatively minor criminal conviction to relitigate the question of the Uintah-Ouray Indian Reservation boundaries. In a separate federal proceeding seven years ago, the Tenth Circuit decided these boundaries against the State. *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986). Now, the State seeks to reopen the boundary issue in a new forum.

I would object to the State's opportunistic misuse of Perank's petty criminal prosecution to readjudicate a settled issue under any circumstance, but the unequal and inadequate briefing of the boundary issue in this case makes it a particularly poor vehicle for bringing us into a direct confrontation with the Tenth Circuit. Perank's brief contained a total of six pages of argument, the bulk of it concerning his assertion that he is an Indian. He allotted fewer than two pages to jurisdictional and boundary issues. In contrast, the State filed a fifty-page brief, devoting the majority of it to an attack on the Tenth Circuit's decision in *Ute Indian Tribe* and to a reargument of the boundary issue. In addition to the disparate treatment of the boundary issue by the immediate parties, Uintah and Duchesne Counties, which were also parties to the Tenth Circuit action, lodged a seventeen-page amicus brief supporting the State's position. Recognizing the one-sidedness of the proceeding, the State's counsel acknowledged at oral argument that perhaps the State's real adversary in this case--the Tenth Circuit--was absent.

We made an attempt to cure the one-sidedness of the briefing by soliciting participation by other parties with interests in this case. Unfortunately, we met with little success. At our invitation, the Ute Indian Tribe filed an amicus brief. However, apparently believing that we would not consider overturning the result of the Tenth Circuit's en banc decision, the Tribe, rather than addressing the impact of the Tenth Circuit's decision on our consideration of the issue or the merits of the boundary dispute, argued only that Perank was not a member of the Tribe and was therefore not in a position to challenge the state court's jurisdiction over him.

The week before argument, we contacted the State and encouraged it to inform the United States Attorney of the upcoming argument and to inquire whether the Justice Department wished to present its position before this court. The Justice Department did not appear at argument. We then invited the Justice Department to brief its position as an amicus. However, the Justice Department, demonstrating a surprising lack of interest in the case, refused to brief the matter and submitted only the brief it had filed years earlier in opposition to the State's petition for a writ of certiorari to the Tenth Circuit in *Ute Indian Tribe*. Thus, the State's arguments on the boundary question were virtually unchallenged.

Notwithstanding the lack of a true adversary proceeding on the boundary issue, the majority eagerly proceeds to the merits of the boundary dispute and takes a position contrary to that of a majority of the entire Tenth Circuit. I would find a direct confrontation with the Tenth Circuit on an essentially federal issue something to be avoided under any circumstances, but this court's rush to adjudicate the issue is especially egregious given the importance of this question and the fact that the interests of all parties affected in the proceeding are not fairly before this court.

The reason I would not reach the merits of the boundary issue can be summed up in one word: comity. Under the doctrine of comity, courts of





one jurisdiction will give effect to the laws and judicial decisions of another out of deference and mutual respect. *See, e.g., Pan Energy v. Martin*, 813 P.2d 1142, 1146 (Utah 1991); *Tracy v. Superior Court*, 810 P.2d 1030, 1041 (Ariz. 1991); *Perrenoud v. Perrenoud*, 480 P.2d 749, 760 (Kan. 1971); *In re Custody of Sengstock*, 477 N.W.2d 310, 314 (Wis. Ct. App. 1991). *See generally* 21 C.J.S. *Courts* §210 (1990). The scope and applicability of the comity doctrine are committed to the sound discretion of each court. *See, e.g., Pan Energy*, 813 P.2d at 1146; *State ex rel. Speer v. Haynes*, 392 So. 2d 1183, 1185 (Ala. Civ. Ct. App. 1979), *rev'd on other grounds sub nom. Ex Parte Haynes*, 392 So. 2d 1187 (Ala. 1988); *Tracy*, 810 P.2d at 1041; *Philadelphia v. Austin*, 429 A.2d 568, 572 (N.J. 1981); *Sheridan v. Sheridan*, 223 N.W.2d 557, 560 (Wis. 1975). The instant case presents compelling reasons to follow the rules of comity and defer to the Tenth Circuit's resolution of the boundary issue.

As a general proposition, we should defer to decisions of coordinate courts that have resolved the precise issue we face, unless doing so would contravene the laws or policy of this state. *See, e.g., Philadelphia*, 429 A.2d at 572; *In re Custody of Sengstock*, 477 N.W.2d at 314. Although we have an interest in determining the scope of our own jurisdiction, I know of no existing state law or policy that would preclude us from deferring to the Tenth Circuit's determination of the boundaries of the Uintah-Ouray Indian Reservation.[1] For example, if we were to defer to the Tenth Circuit's decision, the result would not leave a jurisdictional void resulting in wrongs to this state or its citizens that would go uncompensated or unpunished. The Ute Indian Law and Order Code provides the courts of the Ute Indian Tribe with jurisdiction over civil and criminal matters occurring on the reservation and recognizes the jurisdiction of other forums where the Tribe does not have jurisdiction. *See* The Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah §1-2-5. And we have spoken before of the need to recognize Indian tribes as sovereigns that are entitled to a presumption of legitimacy insofar as the exercise of their judicial power is concerned. *See In re Adoption of Holloway*, 732 P.2d 962, 968 (Utah 1986); *cf. Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48-49 (1989) (approving *Holloway*).

But even if there were some presumption that we should reexamine a federal court determination of the jurisdiction of Utah courts--a proposition neither the State nor the majority advances--the circumstances of this case are more than sufficient to show that such a redetermination is inappropriate. First, comity concerns are heightened here where we are asked to revisit issues of federal law, decided on defensible bases by coordinate federal courts,[2] for the sole purpose of creating a conflict with the federal courts to force Supreme Court review. Comity between federal and state courts is necessary to prevent scandal from unseemly conflicts of jurisdiction and to promote a decent and orderly administration of justice." 21 C.J.S. *Courts* §210 (1990). Instead of seeking to further the interests of comity--prevention of a direct jurisdictional clash and promotion of the uniform administration of justice--the majority's decision to reach and redecide the merits of the boundary question needlessly upsets a previously settled area of law and achieves the opposite effect. Today's decision encourages litigants to forum shop in the hope of inconsistent decisions, an ill comity seeks to avoid in the federal-state context.[3] *See Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990).

An additional reason for applying principles of comity is to recognize the unique role of federal law in regulating Indian lands and interests. Because of this unique role, "federal courts are the ultimate decision maker as to whether federal, state or tribal courts have jurisdiction in a particular Indian law case." *State v. Daly*, 454 N.W.2d 342, 344 (S.D. 1990). The primacy of federal authority in this area stems from at least three sources: the Constitution, the federal statute that admitted Utah to the Union, and the special relationship assumed by the federal government toward Indian tribes.

The Constitution makes the federal government supreme in dealings with Indian tribes. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). Section 8 of Article I gives the federal government power "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes."[4] U.S. Const. art. I, §8, cl. 3. This provision implicitly recognizes that Indian tribes are quasi-sovereign entities with *sui generis* status as "domestic dependent nations" under federal law. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1831). As an aspect of their inherent sovereignty, tribes exercise powers of self-government. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). In line with this grant of authority to the national government, state interference in the government-to-government relationship existing between the United States and Indian tribes is generally prohibited except to the extent that Congress has granted the state such authority. *See Worcester*, 31 U.S. (6 Pet.) at 561-62; Felix S. Cohen, *Handbook of Federal Indian Law* 259 (1982) [hereinafter Cohen].[5] This "'policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.'" *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olsen*, 324 U.S. 786, 789 (1945)). Recognition of this policy was a condition of Utah's admission to the Union. The Enabling Act states:

> [T]he people inhabiting said proposed State do agree that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .

Enabling Act, Act of July 16, 1894, ch. 138, §3, 28 Stat. 107. I recognize that we have concurrent authority with federal courts to construe federal statutes. However, the constitutional commitment of authority over Indian tribes to the federal government requires that we proceed with special care in cases affecting the tribes. And when a federal court has spoken directly on an issue of Indian law, this care should be transformed to an extreme reluctance to redecide the matter.

The federal government's trust responsibility to Indian tribes also bears on the question of whether we should honor comity principles in this case. Ever since Chief Justice Marshall described the relationship of the tribes to the United States as "that of a ward to his guardian," *Cherokee Nation*, 30 U.S. (1 Pet.) at 16, the trust relationship has been a cornerstone of federal Indian jurisprudence. Cohen at 221. Of similar importance is the well-recognized federal policy of supporting tribal self-government and self-determination. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); Cohen at 349. The federal government's trust responsibility to the tribes and the federal policy supporting tribal self-government and self-determination provide a backdrop against which federal courts resolve Indian issues. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). And it is this perspective that underlies the rule that courts are to interpret statutory provisions affecting Indians in favor of the tribes. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Ute Indian Tribe*, 773 F.2d at 1089.[6]

Based on the foregoing considerations, I conclude that comity principles require deference to the Tenth Circuit's disposition of the boundary issue.

Following the course I suggest would not be novel. Several state courts have relied on comity principles in deferring to federal court decisions on Indian law questions. *See, e.g., Daly*, 454 N.W.2d at 344; *State v. Francis*, 563 A.2d 249, 253 (Vt. 1989). Indeed, the South Dakota Supreme Court has gone so far as to overrule one of its cases in recognition of a federal court of appeals' ruling concerning South Dakota's jurisdiction over Indians living within the state. (1991). Similarly, the Oregon Court of Appeals has overruled one of its prior decisions in order to defer to a federal court of appeals' ruling regarding a tribe's treaty right to fish. *State v. Goodell*, 734 P.2d 10, 11-12 (Or. Ct. App.), *rev. denied*, 737 P.2d 1248 (Or. 1987). Although these two courts did not expressly rely on comity principles in their holdings, I see no other obvious bases for the results they reached.

In short, there is well-established precedent for following comity principles in cases such as this.

As a final matter, I register my objection to the majority's treatment of the merits of the boundary issue. Were I to reach the issue, I would follow the exhaustive and thoroughly researched opinions of the federal courts, both trial and appellate. *See Ute Indian Tribe*, 773 F.2d 1087; *Utah Indian Tribe v. State of Utah*, 521 F. Supp. 1072 (D. Utah 1981). They constitute an adequate remonstrance to the majority's disposition of the issue. Specifically, those decisions followed the approach dictated by the Supreme Court in determining whether the various enactments at issue demonstrated a congressional intent to diminish reservation boundaries. That Court has said that, in the absence of "*substantial and compelling evidence* of a congressional intention to diminish Indian lands," the courts' "traditional solicitude for the Indian tribes" must compel a finding that "the old reservation boundaries survived the opening." *Solem v. Bartlett*, 465 U.S. 463, 472 (1984) (emphasis added) (quoted in *Ute Indian Tribe*, 773 F.2d at 1089); *accord Rosebud*, 430 U.S. at 586 ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." (Citation omitted)). The Tenth Circuit and the district court viewed the relevant statutes with this perspective, *see* 773 F.2d at 1089; 521 F. Supp. at 1110 n. 118; a close reading of the majority decision here demonstrates that it does not.

There are times when I, as a state court judge, lament what might be fairly characterized as the second-guessing of our decisions by federal courts simply because they do not like a result we may have reached. *See, e.g., Lafferty v. Cook*, 949 F.2d 1546 (10th Cir. 1991) (disagreeing with *State v. Lafferty*, 749 P.2d 1239 (Utah 1988)) *cert. denied sub nom. Cook v. Lafferty*, 112 S. Ct. 1942 (1992). The present case puts that shoe on the other foot, an exercise that may be ironic, but is even less defensible. The federal government is, after all, supreme on questions that fall within its purview. In this situation, federal statutory law is at issue, the federal trust responsibility to the Indian tribe is at issue, and it was the federal courts that adjudicated the boundary question years ago. As of today, federal supremacy and Supreme Court review of this court's decision provides the only remaining hope for the Ute Tribe, one of those "weak and defenseless people who are the wards of the nation, [and who are] dependent upon its protection and good faith," *Rosebud*, 430 U.S. at 586, for what little is left of the patrimony they held before the whites came to this continent.



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1. In footnote two of the court's opinion, the majority states that the Justice Department "failed to recognize that the Tenth Circuit's *en banc* decision in *Ute Indian Tribe* was in conflict with prior decisions of this [c]ourt." The majority then cites *Sowards v. Meagher*, 37 Utah 212, 108 P. 1112 (1910), and *White Rocks Irrigation Co. v. Mooseman*, 45 Utah 79, 141 P. 459 (1914). Yet as the majority itself recognizes, "it cannot be said, as a technical matter, that the *Sowards* opinion specifically addressed the question of whether the Reservation was disestablished as to the lands that were returned to the public domain." The same observation holds true for *White Rocks Irrigation Co.* Consequently, the implication of the majority opinion in footnote two--that this court has previously ruled on the issue at bar and that the majority opinion is, in part, following established precedent--is simply incorrect.

2. *See, e.g., Hall v. Nomura Securities Int'l*, 268 Cal. Rptr. 45, 49 (Ct. App.), *reh'g denied* (June 20, 1990); *Bouwman v. Department of Social Servs.*, 375 N.W.2d 806, 808 (Mich. Ct. App. 1985); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990); *Van De Hey v. United States Nat'l Bank of Oregon*, 793 P.2d 1388, 1390 (Or. Ct. App. 1248 (Or. 1987). *See generally* Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 Colum. L. Rev. 943 (1948); Annotation, *Duty of State Courts to Follow Decisions of Federal Courts, Other Than the Supreme Court, on Federal Questions*, 147 A.L.R. 857 (1943).

3. The application of comity principles in the federal-state context is not new to this state. On at least one occasion of which I am aware, this court has recognized the appropriateness of deferring to federal court interpretations of federal law. *See Kuchenmeister v. Los Angeles & S.L.R.R.*, 52 Utah 116, 122, 172 P. 725, 727 (1918); *cf. Antillon v. Department of Employment Sec.*, 688 P.2d 455, 457 (Utah 1984) (holding that state court must follow federal court decision construing analogous statute from another state where statutes were enacted as condition of continued federal approval of state unemployment compensation programs).

4. The Treaty Clause, U.S. Const. art. II, §2, and the Supremacy Clause, *id.* art. VI, cl. 2, are also often cited as sources of exclusive federal power in dealing with Indian tribes. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 207-12 (1982).

5. I recognize that the United States Supreme Court's "more recent cases have recognized the rights of states, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands . . . ." *County of Yakima v. Confederated Tribe* 683, , 116 L. Ed. 2d 687, 697 (1992). However, absent congressional authorization, such state jurisdiction is clearly prohibited to the extent that it "'would interfere with reservation self-government or impair a right granted or reserved [to the tribe] by federal law.'" *Id.* (quoting *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962)).

6. *See also National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (holding that policy of supporting tribal self-government and self-determination favors rule that provides tribal courts the first opportunity to evaluate factual and legal bas... for jurisdictional challenges); *Nance v. Environm... Protection Agency*, 645 F.2d 701, 710-11 (...th Cir.) (noting that "*any* Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes" (emphasis in original)), *cert. denied sub nom. Crow Tribe of Indians v. Environmental Protection Agency*, 454 U.S. 1081 (1981).



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## IN THE SUPREME COURT OF THE STATE OF UTAH

**STATE of Utah,**
**Plaintiff and Respondent,**
**v.**
**Patrick Dean COANDO,**
**Defendant and Petitioner.**

**No. 900019**
**FILED: July 17, 1992**

Eighth District, Uintah County
The Honorable Dennis L. Draney

ATTORNEYS:
R. Paul Van Dam, Sandra L. Sjogren, Salt Lake City, for plaintiff
Dixon Hindley, Salt Lake City, for defendant

**This opinion is subject to revision before publication in the Pacific Reporter.**

**On Certiorari to the Utah Court of Appeals**

*DURHAM, Justice*:

The Eighth District Court in Duchesne County, Utah, convicted defendant Patrick Dean Coando of issuing a total of $354.26 in bad checks, a third degree felony, in violation of Utah Code Ann. §76-6-505 (1990). Defendant appealed the conviction to the Utah Court of Appeals, arguing that the trial court lacked jurisdiction because he is an Indian and because Roosevelt, Utah, where defendant issued most of the checks, is in Indian country, on the Uintah-Ouray Indian Reservation. Federal law provides for exclusive federal jurisdiction over a defendant who is an American Indian and who commits a criminal offense in Indian country.[1] 18 U.S.C. §§1152, 1153 (1988). The court of appeals affirmed defendant's conviction, holding that under Utah's bad check statute, the bank's act of refusing payment was an essential element of the crime and that because this act occurred at the drawee bank in Vernal, Utah, a location undisputedly not on reservation land, the State properly asserted jurisdiction under Utah Code Ann. §76-1-201 (1990). We issued a writ of

eighth day of January, nineteen hundred and two, are hereby ratified and approved.

United Peorias and Miamies, Ind. Ter. Sale of surplus lands. Vol. 25, p. 1014.

That so much of the Act approved March second, eighteen hundred and eighty-nine, entitled "An Act to provide for the allotment of land in severalty to United Peorias and Miamies in Indian Territory, and for other purposes," which inhibits the sale of their surplus lands for twenty-five years from said date, be, and the same is hereby, repealed: *Provided*, That before any distribution per capita shall be made of the proceeds of any sale thereof among said Western Miami Indians, there shall first be paid such sum or sums as the Secretary of the Interior may determine to be due for services rendered or expenses incurred by any of the delegates or officers of said Western Miami tribe since the thirty-first day of March, eighteen hundred and ninety.

Peorias. Payment for services.

Omaha, Nebr. Warehouse.

To maintain at the city of Omaha, Nebraska, in the discretion of the Secretary of the Interior, a warehouse for the receipt, storage, and shipping of goods for the Indian Service, ten thousand dollars: *Provided*, That so much of the Act of June seventh, eighteen hundred and ninety-seven, entitled "An Act making appropriations for the current and contingent expenses and fulfilling treaty stipulations with the Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight," as provides that the city of Omaha shall provide, equip, and furnish a building suitable for this purpose free of cost to the United States is hereby repealed.

*Proviso.* Furnishing of building by city repealed. Vol. 30, p. 75.

Saint Louis, Mo. Warehouse.

To maintain at the city of Saint Louis, Missouri, in the discretion of the Secretary of the Interior, a warehouse for the receipt, storage, and shipping of goods for the Indian service, ten thousand dollars.

Allowance for clerks temporarily detailed in Indian Office.

That the accounting officers of the Treasury Department are hereby authorized and directed to allow in the settlement of the accounts of the disbursing officers in charge of the warehouses for Indian supplies, such sums as may have been disbursed by them during the fiscal years nineteen hundred and one and nineteen hundred and two, in payment of clerks appointed to clerkships in such warehouses and temporarily detailed for duty in the office of the Commissioner of Indian Affairs in Washington, District of Columbia.

New York Indians. Clerical expenses. Vol. 31, p. 1077.

That the ten thousand dollars, or so much thereof as may be available, reserved by Act of March third, nineteen hundred and one, out of the amount appropriated for payment of the judgment in favor of the New York Indians, to pay expenses necessary to ascertain the beneficiaries of said judgment, may when necessary be used for the employment of the clerical force necessary therefor in the Office of Indian Affairs.

Uintah and White River Utes. Allotment of irrigable land. *Post*, pp. 744, 867.

That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further*, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease: but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are

Unallotted lands restored to public domain.

*Proviso.* Homestead entries.

Mineral leases.

APPENDIX C



restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

Raven Mining Company.

Application of proceeds from sales.

*Post*, p. 743.

Said item of seventy thousand and sixty-four dollars and forty-eight cents to be paid to the Uintah and White River Utes covers claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and for which the Government has received from said Uncompahgre Indians money aggregating sixty thousand and sixty-four dollars and forty-eight cents; and the remaining ten thousand dollars claimed by the Indians under an Act of Congress detaching a small part of the reservation on the east and under which Act the proceeds of the sale of the lands were to be applied for the benefit of the Indians.

Payments to Indians. Vol. 30, p. 87. *Post*, p. 744.

Devils Lake Reservation. Resurvey.

For the resurvey of the outboundaries of the Devils Lake Indian Reservation and the resurvey of the interior, standard, meander and section lines (including the survey and subdivision of the old Fort Totten Military Reservation), and for the office work and field examination of said surveys and resurveys, twelve thousand dollars.

Canton, S. Dak. Asylum for insane Indians.

For support and maintenance of the asylum for insane Indians at Canton, South Dakota; for pay of employees; for transportation of insane Indians to and from said asylum; for general repairs and improvements, including necessary outbuildings, grading, fencing, and so forth; for incidental and all other expenses necessary to its proper conduct and management, twenty-five thousand dollars.

Navajo Reservation, Ariz. Payment for rights, etc., of settlers.

For the purchase of the right, title, and improvements of certain settlers within the external boundries of the Navajo Indian Reservation in Arizona, as set out in the communication of the Secretary of the Interior to the President, dated January fifth, nineteen hundred, and printed in Senate Document Numbered Sixty-eight, of date of January tenth, nineteen hundred, forty-eight thousand dollars, to be used and expended under the direction and within the discretion of the Secretary of the Interior. And the Secretary of the Interior is authorized and empowered to purchase the right, title, and improvements separately of each and every one of the said persons named in the said communication of the Secretary of the Interior, at the prices separately agreed upon with the settlers therein named. And when so purchased the improvements and the lands upon which they are situated, in and near Tuba City, are hereby set apart for school or public purposes, as may be hereafter decided upon by the Secretary of the Interior, and until required to be used for such public or school purposes shall be used by the Indians under rules and regulations to be prescribed by the Secretary of the Interior: *Provided*, That the appraisement of Earnest A. Lee's property shall be three thousand seven hundred dollars: *Provided further*, That the Secretary of the Interior shall make no payment for any of said right, title, and

Reservation for schools, etc.

*Proviso.* Earnest A. Lee. *Post*, p. 1001. Valuation.

For pay of physician, New York Agency, six hundred dollars.

Physician, New York Agency. Allotments. Vol. 24, p. 388.

To enable the President to cause, under the provisions of the Act of February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians," and so forth, such Indian reservations as in his judgment are advantageous for agricultural and grazing purposes to be surveyed or resurveyed, for the purposes of said Act, and to complete the allotment of the same, including the necessary clerical work incident thereto in the field, and delivery of trust patents, so far as allotments shall have been selected under said Act, forty thousand two hundred dollars. That the sum of twenty thousand dollars, or so much thereof as is necessary, is hereby appropriated, to be immediately available, for the purpose of aiding indigent and identified full-blood Mississippi Choctaws to remove to the Indian Territory, to be expended at the discretion and under the direction of the Secretary of the Interior.

Mississippi Choctaws. Aid to.

For construction of ditches and reservoirs, purchase and use of irrigating tools and appliances, and purchase of water rights on Indian reservations, in the discretion of the Secretary of the Interior and subject to his control, one hundred and fifty thousand dollars: *Provided*, That the Secretary of the Interior may employ such number of superintendents of irrigation, who shall be skilled irrigation engineers, not to exceed four, as in his judgment may be necessary to secure the construction of ditches and other irrigation works in a substantial and workmanlike manner.

Irrigation.

*Proviso.*
Irrigation engineers.

For survey and subdivision of Indian reservations and of lands to be allotted to Indians, and to make allotments in severalty, to be expended by the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, twenty thousand dollars.

Surveying and allotting.

For survey of lands within the Pine Ridge and Standing Rock Indian reservations, South Dakota, and for examination in the field of surveys, the sum of seventeen thousand dollars, to be immediately available, and for clerical work and stationery in the office of the surveyor-general required on surveys within the Pine Ridge and Standing Rock Indian reservations, South Dakota, the sum of three thousand two hundred dollars; in all, the sum of twenty thousand two hundred dollars.

Pine Ridge and Standing Rock reservations. Surveys.

For compensation of the commissioner authorized by the Indian appropriation Act approved June seventh, eighteen hundred and ninety-seven, to superintend the sale of land, and so forth, of the Puyallup Indian Reservation, Washington, who shall continue the work as therein provided, two thousand dollars.

Puyallup Reservation, Wash. Commissioner to sell lands. Vol. 30, p. 87.

That the principal chief of the Quapaw tribe, with the consent of the tribal council, may sell the surplus tract of one hundred and sixty acres of Quapaw land heretofore set apart for school purposes, and the Secretary of the Interior is directed to pay out the proceeds of such sale, per capita, to the Quapaw people: *Provided*, That the money hereinbefore appropriated "for education" per third article of the Quapaw treaty of May thirteenth, eighteen hundred and thirty-three, and the unexpended balance of the same heretofore appropriated, not to exceed two thousand dollars, shall be paid to the treasurer of the Quapaw tribe or nation, and expended by him, under the direction of the Quapaw Council, for educational purposes only.

Quapaws. Sale of school lands.

*Proviso.*
Education. *Ante*, p. 996.

To enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the purposes of so much of the Act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Walker River Reservation in Nevada, and the Uintah and White River Utes in Utah, and the joint resolution of June nineteenth, nineteen hundred and two,

Walker River Indians, Nev. Uintah and White River Utes, Utah. Survey, etc., of irrigable lands. *Ante*, pp. 240, 252, 575, 741.

APPENDIX D



providing for the allotment of the Indians of Spokane Reservation in Washington, to be immediately available, one hundred and seventy-five thousand dollars: *Provided, however*, That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the Act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said Act: *And provided further*, That the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not exceed two hundred and fifty thousand acres: *And provided further*, That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the Act of May twenty-seventh, nineteen hundred and two, be, and the same is hereby, extended to October first, nineteen hundred and four.

*Proviso.* Obtaining consent to allotment.

Grazing lands. Restriction.

*Ante*, p. 774.

Unallotted lands. Time of opening to settlement extended. *Ante*, p. 261.

That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, or other like substances, which were reserved from location and entry by provision in the Act of Congress entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June seventh, eighteen hundred and ninety-seven, all discoveries and locations of any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in the office of the County recorder of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral land laws, provided that the owners of such locations shall relocate their respective claims and record the same in the office of the County recorder of Uintah County, Utah, within ninety days after the passage of this Act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms and with such restrictions as may be prescribed in a proclamation of the President of the United States issued for that purpose not less than one hundred and twenty days after the passage of this Act, and not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress.

Uncompahgre Indian Reservation. Mining claims located on prior to January 1, 1891, valid.

Vol. 30, p. 87.

Patents to issue on relocation, etc., of claims.

Claims located after January 1, 1891, invalid.

Sale of remainder of mineral lands.

Restrictions.

Balance of lands reserved.

That the Secretary of the Interior be, and he is hereby, directed to negotiate with the Weeminuchi Ute tribe of Indians for the relinquishment of their right of occupancy to the United States to the tract of land known as the Mesa Verde—a part of the reservation of said tribe—situate in the county of Montezuma, in the State of Colorado; the said tract to include and cover the ruins and prehistoric remains situate therein. And the Secretary of the Interior shall

Weeminuchi Utes, Colo.

Negotiations for release of Mesa Verde authorized. *Post*, p. 1057.

Report

Omaha, Nebr. Warehouse.

To maintain at the city of Omaha, Nebraska, in the discretion of the Secretary of the Interior, a warehouse for the receipt, storage, and shipping of goods for the Indian service, ten thousand dollars.

Saint Louis, Mo. Warehouse.

To maintain at the city of Saint Louis, Missouri, in the discretion of the Secretary of the Interior, a warehouse for the receipt, storage, and shipping of goods for the Indian service, ten thousand dollars.

San Francisco, Cal. Warehouse.

To maintain at the city of San Francisco, California, in the discretion of the Secretary of the Interior, a warehouse for the receipt, storage, and shipping of goods for the Indian service, ten thousand dollars, to be immediately available.

Louisiana Purchase Exposition. Indian exhibit.

The Secretary of the Interior is authorized to cause to be assembled, at the city of Saint Louis, in the State of Missouri, at such time and for such period as he may designate, and as a part of the Louisiana Purchase Exposition, to be held at the city of Saint Louis, in the State of Missouri, pursuant to an Act of Congress entitled "An Act to provide for celebrating the one hundredth anniversary of the purchase of the Louisiana territory by the United States by holding an international exhibition of arts, manufactures, and the products of the soil, mine, forest, and sea in the city of Saint Louis, in the State of Missouri," approved March third, nineteen hundred and one, such representatives of the different Indian tribes and such exhibits from Indian agencies, schools, and archives as he may deem advisable or necessary to illustrate the past and present conditions of the Indians and the Indian tribes of the United States, and progress made by such in education, art, and industry, and the methods of education and government, and such other matters and things as will fully illustrate Indian advancement in civilization, the details of which shall be in the discretion of the Secretary of the Interior. And for the purpose of carrying into effect this provision the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but the Secretary of the Interior is prohibited from making, or causing to be made, any expenditure or creating any liability on behalf of the United States in excess of the sum hereby appropriated.

Vol. 31, p. 1442.

Appropriation.

Limit to expenditures.

Sioux Indian Reservation, Dak. Allotments. Vol. 25, p. 888.

To enable the President to cause, under the provisions of the Act of March second, eighteen hundred and eighty-nine, entitled "An Act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes," to be allotted the lands in said separate reservations as provided in said Act, including the necessary resurveys, ten thousand dollars.

Canton, S. Dak. Asylum for insane Indians.

For the equipment and maintenance of the asylum for insane Indians at Canton, South Dakota, for incidental and all other expenses necessary for its proper conduct and management, including pay of employees, and for necessary expense of transporting insane Indians to and from said asylum, twenty-five thousand dollars.

Pueblo Indians, New Mexico. Attorney.

For pay of one special attorney for the Pueblo Indians of New Mexico, one thousand five hundred dollars, and for necessary traveling and incidental expenses of said attorney for the Pueblo Indians of New Mexico, five hundred dollars; in all, two thousand dollars.

Uintah Reservation, Utah. Time of opening unallotted lands extended. Vol. 32, pp. 263, 998. *Post*, p. 1069.

That the time for opening the unallotted lands to public entry on the Uintah Reservation, in Utah, as provided by the Acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, be, and the same is hereby extended to March tenth, nineteen hundred and five, and five thousand dollars is hereby appropriated to enable the Secretary of the Interior to do the necessary surveying, and otherwise carry out the purposes of so much of the Act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other

Surveys.

APPENDIX E



purposes, as provides for the allotment of the Indians of the Uintah and White River Utes in Utah.

New York Indians. Deduction from appropriation to pay judgment of Court of Claims in favor of. Vol. 31, p. 27.

The Secretary of the Interior is authorized and directed to withhold from the amount appropriated by Act of February ninth, nineteen hundred, to pay the judgment of the Court of Claims in favor of the New York Indians, an additional sum not exceeding five thousand dollars, to be immediately available, and to apply it in the payment of expenses necessary in ascertaining the beneficiaries of said judgment.

Indian Territory. Sale of lands covered by coal, etc., leases.

That the Secretary of the Interior be, and he is hereby, authorized and directed, upon the sale of lands in Indian Territory covered by coal and asphalt leases, to sell such lands subject to the right of the lessee to use so much of the surface as may be needed for coke ovens, miners' houses, store and supply buildings, and such other structures as are generally used in the production and shipment of coal and coke.

Surrender of leases.

Notice.

Proviso. Payment of royalty.

Lessees may use the tipples and underground workings located on any lease in the production of coal and coke from adjoining leases, and are hereby authorized to surrender leased premises to the owner thereof on giving sixty days' notice in writing to such owner and paying all charges and royalties due to the date of surrender: *Provided, however*, That nothing herein contained shall release the lessee from the payment of the stipulated royalty so long as such lessee remains in possession of any of the surface of the lands included in his lease for any purpose whatever: *And provided*, That any lessee may remove or dispose of any machinery, tools or equipment the lessee may have upon the leased lands.

Removal, etc., of machinery, etc.

Osage Indians. Payment from grazing fund to licensed Indian traders.

That the Secretary of the Interior be, and he is hereby, authorized and directed to apply the funds derived from grazing now standing to the credit of the Osage Indians in the Treasury, together with such portion of the funds hereafter derived from such source as may be necessary, as a tribal or community fund, in the payment of the balance now remaining due on the claims of certain licensed Indian traders against individual members of the tribe: *Provided*, That after said debts are paid the proceeds from the rental of pastures (known as grass money) and the royalties from oil and gas shall be applied to the reimbursement of said tribal or community fund of the amount paid out under this provision.

Proviso. Reimbursement.

Shawnee and Delaware Indians. Claims, etc., of intermarried whites. Jurisdiction of Court of Claims extended to. Vol. 26, p. 636, amended. *Post*, p. 1071.

That the Act entitled "An Act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," approved October first, eighteen hundred and ninety, be, and the same is hereby, amended so as to confer upon the Court of Claims the same jurisdiction to determine the claims and rights of those alleged citizens of the Cherokee Nation known as intermarried whites as is therein conferred upon said court relative to the rights and claims of the Shawnee and Delaware Indians and the freedmen of said Cherokee Nation, and said case shall be advanced on the calendar of said Court of Claims and the calendar of the Supreme Court, if the same is appealed. Said court in said judgment shall fix the amount due the attorney or attorneys of record for their legal services, not exceeding the amount stipulated by the contracts between said claimants and said attorneys, and shall in said judgment direct that the accounting officers of the United States shall deduct from the amount due each claimant the attorney fee allowed in said judgment and pay the same directly to said attorneys and shall pay the balance to the claimants.

Attorney's fees.

J. Hale Sypher. Claim referred to Court of Claims. *Post*, p. 1069.

That the claim of J. Hale Sypher against the Choctaw Nation, for legal and professional services rendered by him to said nation, under an agreement made and entered into between the legally authorized commissioners of said nation and said Sypher on the seventh day of November, eighteen hundred and ninety-one, is hereby referred to the Court of Claims for adjudication; and jurisdiction is hereby conferred

Act of March 3, 1905, ch. 1479, 33 Stat, 1048, 1069-1070, III Kapp. 124, 146-147 (1913), LD 105:

Uintah Reservation Utah.
Restriction on grazing lands repealed.
1902, J. R. 31, 32 Stat., 744, vol. 1, p. 799
1903, ch. 994, 32 Stat., 998, ante, p. 17

That so much of the act of March third, nineteen hundred and three, as provides that the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.

Unallotted lands.
Time extended for opening, to entry.
1904, ch. 1462, 33 Stat., 227, ante, p. 44.

That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *And provided further*, That all lands opened to settlement and entry under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the act of Congress of May twenty-seventh, nineteen hundred and two, and the acts amendatory thereof and supplemental thereto.

1902, ch. 888, 32 Stat., 263, vol. 1, p. 753.

Proviso.
Soldiers' and sailors' rights.
R. S. secs. 2304, 2305. 33 Stat., 1070.

Sale of remaining lands.

Proceeds of sale.
1902 ch. 888, 32 Stat., 263, vol. 1, p. 753.



Uintah Forest Reserve.
Additional land reserved.
32 Stat., 263.

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided*, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.[1]

Reservoir site.

Proviso.
Proceeds of timber sales.

Raven Mining Co.
Certificate of location of claims, etc.

That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in the office of the Secretary of the Interior, in the city of Washington, said description and a map showing the locations made by it on the Uintah Reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two (Statutes at Large, volume thirty-two, page two hundred and sixty-three); and thereupon the Secretary of the Interior shall forthwith cause said locations to be inspected and report made, and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each of said claims: *Provided further*, That the Florence Mining Company entitled under the act of Congress approved May twenty-seventh, nineteen hundred and two, to the preferential right to locate not to exceed six hundred and forty acres of contiguous mineral land in the Uintah Reservation, Utah, shall within sixty days from the passage of this act file in the office of the recorder of deeds of the county in which its location is made a proper description of its claim, and it shall within the same time file in the office of the Secretary of the Interior said description and a map showing the location made by it on the Uintah Reservation, Utah, and thereupon the Secretary of the Interior shall forthwith cause said location to be inspected and report thereon made, and if found not to exceed six hundred and forty acres he shall issue a patent in fee to said company for the said land: *And provided further*, That the extension of time for opening the unallotted lands to public entry herein granted shall not extend the time to make locations to any person or company heretofore given a preferential right, but the Raven Mining Company and the Florence Mining Company pending the time for opening to public entry the Uintah Reservation shall have the right of ingress and egress to and from their respective properties over and through said reservation.

1902, ch. 888, supra.

Patent to.

Proviso.

Florence Mining Co.
Certificate of location of claim.

Patent to.

Right of ingress, etc.

# CHAPTER 53. INDIANS


Section
1151. Indian country defined
1152. Laws governing
1153. Offenses committed within Indian country
1154. Intoxicants dispensed in Indian country
1155. Intoxicants dispensed on school site
1156. Intoxicants possessed unlawfully
1157. Livestock sold or removed [Repealed]
1158. Counterfeiting Indian Arts and Crafts Board trade-mark
1159. Misrepresentation in sale of products
1160. Property damaged in committing offense
1161. Application of Indian liquor laws
1162. State jurisdiction over offenses committed by or against Indians in the Indian country
1163. Embezzlement and theft from Indian tribal organizations
1164. Destroying boundary and warning signs
1165. Hunting, trapping, or fishing on Indian land


## HISTORY; ANCILLARY LAWS AND DIRECTIVES

**Explanatory notes:**
The bracketed word "Repealed" is inserted in item 1157, because Act July 10, 1957, P.L. 85-86, 71 Stat. 277 repealed section 1157, but did not amend this chapter analysis to reflect such repeal.

**Amendments:**
**1953.** Act Aug. 15, 1953, ch 502, 505 § 1, 67 Stat. 586, 588, added items 1161 and 1162.

**1956.** Act Aug. 1, 1956, ch 822, § 1, 70 Stat. 792, added item 1163.

**1960.** Act July 12, 1960, P. L. 86-634, § 3, 74 Stat. 469, added items 1164 and 1165.

## CROSS REFERENCES

Indian contracts, 18 USCS §§ 437–439.
Indians generally, 25 USCS §§ 1 et seq.

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## § 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title [18 USCS §§ 1154 and 1156], the term "Indian country", as used in this chapter [18 USCS §§ 1151 et seq.], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities





within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
(June 25, 1948, ch 645, § 1, 62 Stat. 757; May 24, 1949, ch 139, § 25, 63 Stat. 94.)

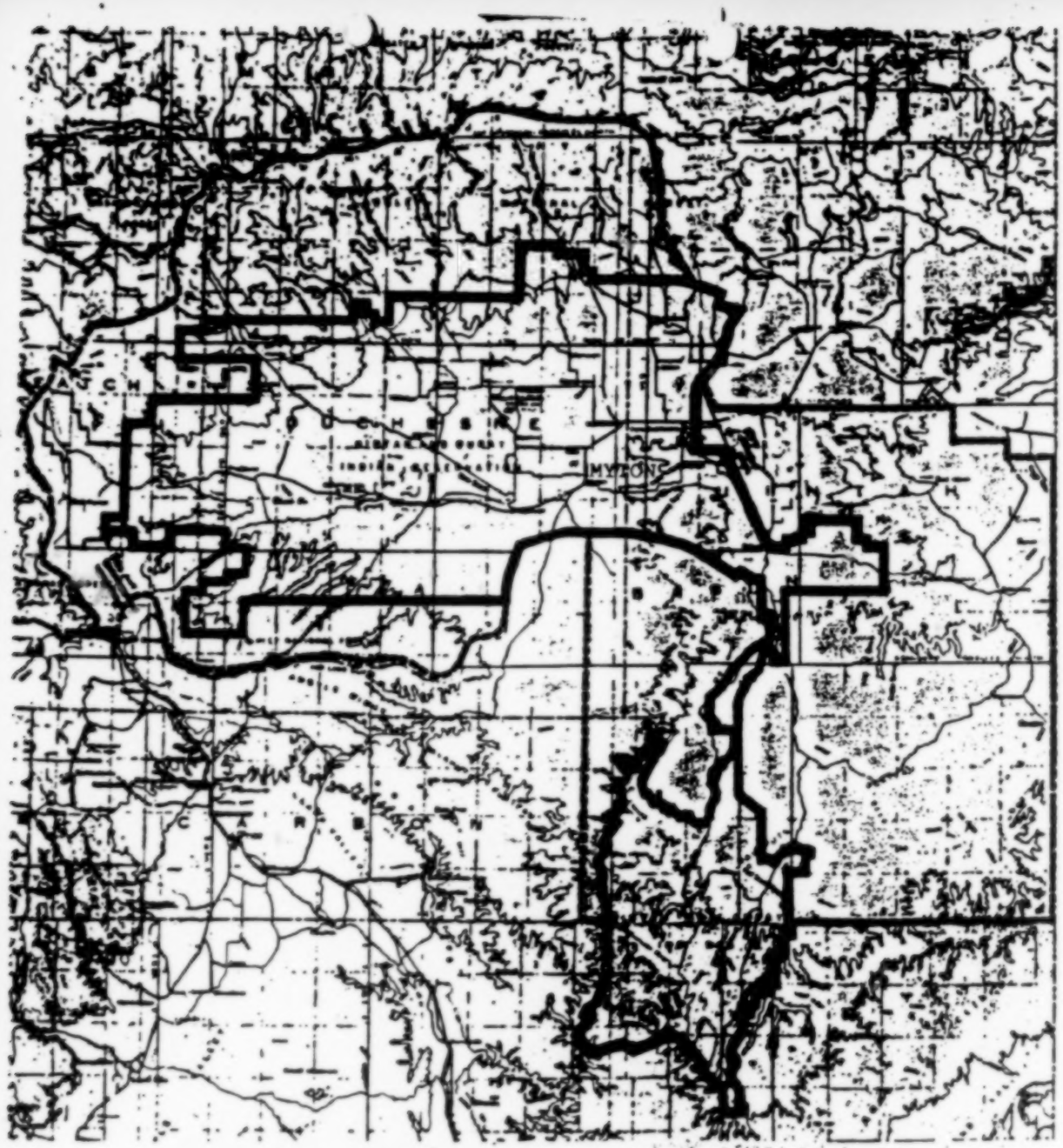
## HISTORY; ANCILLARY LAWS AND DIRECTIVES

**Prior law and revision:**
This section is based on R. S. §§ 2142, 2143, 2144, 2145, 2146; Act Feb. 18, 1875, ch 80, § 1, 18 Stat. 318; Mar. 4, 1909, ch 321, §§ 328, 329, 35 Stat. 1151; Mar. 3, 1911, ch 231, § 291, 36 Stat. 1167; June 28, 1932, ch 284, 47 Stat. 337 (former 18 U.S.C. §§ 548 and 549 and former 25 U.S.C. §§ 212, 213, 215, 217, and 218).
This section consolidates numerous conflicting and inconsistent provisions of law into a concise statement of the applicable law. R. S. §§ 2145, 2146 extended to the Indian country, with notable exceptions, the criminal laws of the United States applicable to places within the exclusive jurisdiction of the United States. Crimes of Indians against Indians, and crimes punishable by tribal law were excluded. The confusion was not lessened by the cases of U. S. v. McBratney, 104 US 622, 26 LEd 869, and Draper v. U. S., 164 US 240, 41 LEd 419, 17 SCR 107, holding that crimes in Indian country by persons not Indian are not cognizable by federal courts in the absence of reservation or cession of exclusive jurisdiction applicable to places within the exclusive jurisdiction of the United States. Because of numerous statutes applicable only to Indians and prescribing punishment for crimes committed by Indians against Indians, "Indian country" was defined but once. (See Act June 30, 1834, ch 161, § 1, 4 Stat. 729, which was later repealed.) This definition is based on the latest construction of the term by the United States Supreme Court in U. S. v. McGowan, 302 US 535, 82 LEd 410, 58 SCR 286, following U. S. v. Sandoval, 231 US 28, 58 LEd 107, 34 SCR 1. (See also Donnelly v. U. S., 228 US 243, 57 LEd 820, 33 SCR 449, AnnCas 1913E, 710; and Kills Plenty v. U. S., (CCA 8), 133 F(2d) 292.) Indian allotments were included in the definition on authority of the case of U. S. v. Pelican, 232 US 442, 58 LEd 676, 34 SCR 396.

**Amendments:**
**1949.** Act May 24, 1949, substituted "Except as otherwise provided in sections 1154 and 1156 of this title, the" for "The".

## CROSS REFERENCES

Laws governing offenses committed in Indian country, 18 USCS § 1152.
Offenses committed by Indians in Indian country, 18 USCS § 1153.
Definition of Indian country in relation to intoxicants dispensed in Indian country, 18 USCS § 1154.




Original 1861 and 1882 Reservation Boundaries

Present Boundaries of the Uintah and Ouray Reservation

APPENDIX H

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH

| | |
|---|---|
| STATE OF UTAH,<br><br>PLAINTIFF,<br><br>VS.<br><br>ROBERT P. HAGEN,<br><br>DEFENDANT. | REPORTER'S TRANSCRIPT<br>OF PROCEEDINGS<br>CRIMINAL NO. 89-CR-410 |

CERTIFIED COPY

BE IT REMEMBERED, THAT ON JANUARY 22, 1990, THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING IN THE COURTROOM OF THE DUCHESNE COUNTY COURTHOUSE, DUCHESNE UTAH; SAID CAUSE BEING HEARD BY THE HONORABLE DENNIS L. DRANEY, JUDGE IN THE EIGHTH JUDICIAL DISTRICT, STATE OF UTAH.

* * *

A P P E A R A N C E S

FOR THE STATE: HERBERT WM. GILLESPIE, ESQ.
DUCHESNE COUNTY ATTORNEY
P. O. BOX 206
DUCHESNE, UTAH 84021

FOR THE DEFENDANT: HARRY H. SOUVALL, ESQ.
MC RAE & DE LAND
ATTORNEYS AT LAW
209 EAST 100 NORTH
VERNAL, UTAH 84078

APPENDIX I

COMPUTER ASSISTED TRANSCRIPT

) SOUVALL: NO, YOUR HO[illegible]. WITH THE FACTS TO APPLY TO THE MEMORANDUM I DON'T BELIEVE SO.

THE COURT: ALL RIGHT. MR. GILLESPIE? I WOULD PREFER TO HAVE YOU RESPOND IN MEMORANDA FORM IF YOU HAVE ANYTHING TO RESPOND. IS THAT POSSIBLE?

MR. GILLESPIE: IT'S POSSIBLE, BUT I WOULD PREFER TO RESPOND ORALLY. I BELIEVE INDIAN CASE LAW IS EXHAUSTIVE.

THE COURT: IF YOU ARE GOING TO DO THAT THEN I'M GOING TO ALLOW MR. SOUVALL TO DO SO.

MR. GILLESPIE: THAT'S FINE.

MR. SOUVALL: YOUR HONOR, I WOULD PREFER TO SUBMIT THIS ON MEMORANDUM SO I WOULD HAVE A CHANCE TO REVIEW MR. GILLESPIE'S CASES THAT HE SUBMITS AND SUBMIT WITH MY MEMORANDUM.

THE COURT: THIS IS THE TIME SET FOR ORAL ARGUMENT. IF ONE PARTY WANTS TO PROCEED ON THAT BASIS WE WILL DO SO. DO YOU DESIRE TO MAKE ORAL ARGUMENT?

MR. SOUVALL: I'LL RESPOND TO MR. GILLESPIE.

THE COURT: VERY WELL. MR. GILLESPIE?

MR. GILLESPIE: YOUR HONOR, MR. SOUVALL'S MEMORANDUM STATES MR. HAGEN IS A MEMBER OF THE LITTLE SHELL BAND OF CHIPPEWA. WE CONCEDE THAT. DEFENDANT IS A PEMBINA DESCENDENT. WE CONCEDE THAT. HE RESIDES IN MYTON, UTAH WHERE HE OWNS A HOME. WE CONCEDE THAT HE



RESIDES I[illegible]YTON, UTAH, BUT AS THIS [illegible]URT IS WELL AWARE THE STATE TAKES THE POSITION THAT THE UINTAH OURAY RESERVATION CONSISTS OF TRUST LANDS, AND THAT THERE IS NO TESTIMONY THAT THE DEFENDANT WAS RESIDING ON TRUST LAND. WE FEEL THE OPINION WAS THE CORRECT DECISION THAT IS PRESENTLY BEFORE THE UTAH SUPREME COURT IN STATE VERSUS PERANK AND THE APPELLATE COURT IN STATE VERSUS CONDO AND SPECIFICALLY DID NOT REACH THAT QUESTION. SO WE WOULD FIRST SAY THAT THE OFFENSE WAS NOT COMMITTED IN INDIAN COUNTRY. THREE AND FOUR. AND THEN NUMBER FIVE THAT HE IS ELIGIBLE FOR PEMBINA JUDGMENT FUNDS, AND RECEIVES MEDICAL BENEFITS. WE WOULD SAY OTHER BENEFITS HAS NOT BEEN PROVED, BUT MEDICAL BENEFITS WE WOULD CONCEDE THAT. SO THAT THE ISSUE COMES DOWN I GUESS TO TWO. NUMBER ONE, IS IT INDIAN COUNTRY, AND THAT'S PRESENTLY BEFORE THE UTAH SUPREME COURT. BUT IF THE COURT WOULD FOLLOW THE OPINIONS OF THIS DISTRICT, IT HAS BEEN DETERMINED IN THIS DISTRICT THAT MYTON IS NOT IN INDIAN COUNTRY. THAT WAS SPECIFICALLY I BELIEVE DETERMINED BY THE PRIOR COURT HERE, AND PRECEDENT OF THIS DISTRICT IS SUCH.

SECONDLY, UNDER THE COHEN DEFINITION, FROM THE HANDBOOK OF FEDERAL INDIAN LAW, RECOGNIZING THE POSSIBLE DIVERSITY OF DEFINITION OF INDIANHOOD WE MAY NEVERTHELESS FIND SOME PRACTICAL VALUE IN A DEFINITION OF

TENTH CIRCU[illegible]WERE CORRECT-EVERYONE [illegible]T HUNTS AND FISHES -- IN THIS COURTROOM MANY HAVE LIVED ON THE RESERVATION ALL THEIR LIFE AND GO TO POW WOW'S REGULARLY. HUNTS, FISHES, ET CETERA, BUT ARE UNFORTUNATELY NOT ENTITLED TO TREATMENT AS AN INDIAN, AND I THINK THAT DEFENDANT WOULD FALL IN THAT CATEGORY.

THE COURT: THANK YOU COUNSEL.

IN THIS MATTER THE COURT HAVING -- THE ONLY CASE THAT I DID NOT GET A COPY OF WAS THE VIALPANDO CASE OUT OF WYOMING, BUT HAVING CONSIDERED THE ARGUMENT MADE IN COUNSEL'S MEMORANDUM, THE MOTION TO ARREST JUDGMENT AND WITHDRAW GUILTY PLEA IS DENIED. THE COURT DOES NOT MEET THE QUESTION OF RESERVATION STATUS BECAUSE THE COURT FINDS THAT THE DEFENDANT IS NOT AN INDIAN UNDER ANY DEFINITION WHICH THE COURT BELIEVES CAN BE REASONABLY APPLIED IN THIS CASE. IF THE QUESTION OF RESERVATION STATUS HAD TO BE ADDRESSED THIS COURT WOULD HAVE TO WITHDRAW. I SPENT A GOOD PART OF TEN YEARS ARGUING THAT VERY QUESTION, AND QUITE FRANKLY I ALREADY HAVE MY MIND MADE UP ON THAT POINT. BUT WE ARE NOT ADDRESSING THAT QUESTION. THE COURT FINDS THAT IN FACT THERE IS A GREAT DIVERSITY OF DEFINITIONS OF WHAT CONSTITUTES THE STATUS OF AN INDIAN. BECAUSE OF THE GREAT DIVERSITY AND BECAUSE THERE NEEDS TO BE AT LEAST SOME REASONABLE UNIFORMITY IN THE ESTABLISHMENT OF THAT, THE COURT FINDS



THAT THE [illegible]NDARD APPLIED BY THE CO[illegible]S OF FEDERAL REGULATIONS AND BY THE UTE INDIAN TRIBE IN DEFINING THAT AS AN ENROLLED MEMBER OF A FEDERALLY RECOGNIZED TRIBE IS AN APPROPRIATE ONE.

THE COURT DOES NOT BASE IT ON THAT DETERMINATION ALONE, BUT I DO BELIEVE THAT IN ORDER FOR THERE TO BE SOME VARIATION FROM THAT WE MUST HAVE AT LEAST CLEAR AND CONVINCING EVIDENCE. NOT JUST PREPONDERANCE. THERE MUST BE SUBSTANTIAL EVIDENCE SHOWN THAT THERE IS A REASON TO VARY FROM THAT DEFINITION, AND THE COURT FINDS THAT HAS NOT BE SHOWN IN THIS CASE.

ADDITIONALLY THE COURT RULES THAT BASED UPON THE RULING OF THE UTE TRIBAL COURT, OR THE PERHAPS IT WAS THE BIA COURT AT THAT TIME, THAT THAT COURT DID NOT HAVE JURISDICTION OVER MR. HAGEN. IF THIS COURT WERE TO RULE THAT THE STATE COURTS HAD NO JURISDICTION THE PUBLIC WOULD HAVE NO RECOURSE TO DEAL WITH THE VIOLATIONS THAT MR. HAGEN HAS ADMITTED TO. AND THAT BEING THE CASE THE MOTION IS DENIED.

THE NEXT STEP THEN COUNSEL IS THE IMPOSITION OF SENTENCE. DO YOU WANT TO DO THAT TODAY, MR. SOUVALL, OR DO YOU WANT TO DO THAT AT A LATER DATE?

MR. SOUVALL: YOUR HONOR, IT WOULD BE OUR WISH TO GO FORWARD WITH THAT TODAY. I WOULD REQUEST PERHAPS A LITTLE TIME TO REVIEW THE PRE-SENTENCE REPORT AGAIN AND

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH, | : | |
| Plaintiff-Petitioner, | : | Case No. |
| v. | : | |
| ROBERT P. HAGEN, | : | Category No. 13 |
| Defendant-Respondent. | : | |

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

- - - - - - - -

R. PAUL VAN DAM (3312)
Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

Attorneys for Petitioner

ROBERT P. HAGEN
c/o Harry Souvall
209 East 100 North
Vernal, Utah 84078

Pro Se

APPENDIX J

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH, | : | |
| Plaintiff-Petitioner, | : | Case No. |
| v. | : | |
| ROBERT P. HAGEN, | : | Category No. 13 |
| Defendant-Respondent. | : | |

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

- - - - - - - -

## QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Did the court of appeals erroneously conclude that this Court could not reach a decision in State v. Perank, Case No. 860196, a pending case, contrary to Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986), that would have any practical effect?

2. Did the court of appeals erroneously refuse to remand defendant's case to the trial court for reconsideration of the jurisdictional question under a correct allocation of proof and a proper standard of proof?

## OPINION BELOW

The court of appeals' opinion was issued on November 23, 1990, and appears in State v. Hagen, 148 Utah Adv. Rep. 44 (Utah Ct. App. Nov. 23, 1990) (a copy of the opinion is contained in the addendum).

FILED
NOV 9 1992
OFFICE OF THE CLERK

No. 92-6281

In the
**SUPREME COURT OF THE UNITED STATES**
October Term, 1992

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ROBERT P. HAGEN,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE UTAH SUPREME COURT**

---

# BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

R. PAUL VAN DAM
Attorney General of Utah
JAN GRAHAM
Utah Solicitor General
DAVID B. THOMPSON
Assistant Attorney General
MICHAEL M. QUEALY
**(Counsel of Record)**
Assistant Attorney General
1636 West North Temple
Suite 300
SALT LAKE CITY UT 84116
(801) 538-7227

--Attorneys for Respondent--

No. 92-6281

In the
**SUPREME COURT OF THE UNITED STATES**
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ROBERT P. HAGEN,

Petitioner,

vs.

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**ON PETITION FOR WRIT OF CERTIORARI**
**TO THE UTAH SUPREME COURT**

# BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR CERTIORARI

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R. PAUL VAN DAM
Attorney General of Utah
JAN GRAHAM
Utah Solicitor General
DAVID B. THOMPSON
MICHAEL M. QUEALY
**(Counsel of Record)**
Assistants Attorney General
1636 West North Temple
Suite 300
SALT LAKE CITY UT 84116
(801) 538-7227

--Attorneys for Respondent--

## QUESTION PRESENTED

1. In light of conflicting decisions by the Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit, whether the language of the Uintah Act of May 27, 1902 (32 Stat. 245), as amended, providing that the unallotted lands of the original Uintah Indian Reservation shall be restored to the public domain, constituted clear language of disestablishment, as this Court has recognized, so as to confer criminal jurisdiction upon the State of Utah over offenses involving Indians within the area so restored to the public domain.

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MISCELLANEOUS AUTHORITIES CITED:

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The opinion of the Utah Supreme Court in State v. Hagen is reported at 191 Utah Adv. Rep. 26 (1992) (Resp. App. A, p. 1a). The opinion of the Utah Supreme Court in the companion case of State v. Perank is reported at 191 Utah Adv. Rep. 5 (1992) (Resp. App. B, p. 4a). The opinion of the U.S. Court of Appeals for the Tenth Circuit en banc in Ute Indian Tribe v. State of Utah is reported at 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986) (Resp. App. C, p. 76a).

## JURISDICTION

The judgment of the Utah Supreme Court was entered on July 17, 1992. No rehearing was sought. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## STATUTES INVOLVED

The relevant statutes and presidential proclamations relating to the Uintah Reservation are reprinted in our appendix as Appendix D (beginning at Resp. App., p. 138a). The Act of May 27, 1902 (32 Stat. 245, 263), as amended, is reprinted at Resp. App. D, p. 138a. The Act of March 3, 1903 (32 Stat. 982, 997-998) is reprinted at Resp. App. D, p. 142a. The Act of April 21, 1904 (33 Stat. 189) is reprinted at Resp. App. D, p. 145a. The Act of March 3, 1905 (33 Stat. 1048, 1069-70) is reprinted at Resp. App. D, p. 145a. The Presidential Proclamation of July 14, 1905, 34 Stat. 3119, III Kapp. 605 (1913) is reprinted at Resp. App. D, p. 155a.

## STATEMENT OF THE CASE

### A. Preface

The jurisdictional boundaries of the Uintah Indian Reservation have been the subject of litigation, uncertainty and conflict for more than fifteen years. The State of Utah prevailed in the Utah Supreme Court; nonetheless, the State of Utah supports the granting of certiorari in this case. This Court should resolve the conflicting decisions between the state and federal courts on this issue. A final resolution of this controversy is essential for federal, state and tribal law enforcement officials, and for the Indian and non-Indian citizens of northeastern Utah.

### B. Prior Proceedings on Uintah Reservation Boundaries

In 1977, the question of the status of the Uintah portion of the Uintah and Ouray Indian Reservation was considered by the Utah Supreme Court in Brough v. Appawora, 553 P.2d 934 (Utah 1976), vacated, Mem. 431 U.S. 901 (1977), a civil action arising out of an auto accident. The Utah Supreme Court ruled that the original Uintah Reservation had ceased to exist, but did so without detailed analysis or discussion. Pursuant to a petition for a writ of certiorari, and at the suggestion of the United States, this Court vacated that judgment and remanded the case for further consideration of the boundary issue in light of Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). Brough, 431 U.S. 901 (1977). The Utah Supreme Court then remanded the case to the trial court to take evidence on the status of the reservation. However, upon



remand, the Indian defendant removed the action to federal district court. Brough was ultimately dismissed without any resolution of the boundary issue as per the instructions of this Court.

In the meantime, the reservation boundary issue surfaced in another action then pending in the United States District Court for Utah. After enacting an expansive Law & Order Code in 1975, the Ute Indian Tribe sought a declaratory judgment that its Code was effective within the historic boundaries of the original Uintah and Uncompahgre Reservations.[1] The State of Utah, Duchesne and Uintah Counties, and several local municipalities lying within those original boundaries were defendants. A full trial was held and a voluminous record as to the history of the opening of the reservation was developed. In that case there was never any dispute that all Indian allotments and other land set aside and held in trust for the Ute Tribe (trust lands) were still part of the reservation. The controversy there, as here, involved the status of the patented fee lands which were opened by Congress to non-Indian settlement.

The federal district court held that the Uncompahgre Reservation had been completely disestablished but that the Uintah Reservation had been only partially diminished by the acts of Congress opening the respective reservations to non-Indian settlement. The district court held that large areas of non-Indian land were still within

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[1] The old Uncompahgre Reservation--while addressed in the federal litigation--is not directly at issue here, since Petitioner Hagen's crime was committed within the original boundaries of the Uintah Reservation.

the boundaries of the Uintah Reservation. Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D.C. Utah 1981).

On appeal, a panel of the Tenth Circuit Court of Appeals affirmed the lower court's determination that certain parts of the Uintah Reservation and all of the Uncompahgre Reservation had been disestablished. Moreover, the panel reversed as to the non-Indian lands within the opened portion of the Uintah Reservation, and held that reservation status had ended with respect to those lands when they were restored to the public domain and opened up to settlement. Thus, the panel held that the present-day reservation consisted of only the "trust lands." Ute Indian Tribe v. State of Utah, 716 F.2d 1298 (1983).[2]

The Ute Tribe petitioned for rehearing, and after this Court's decision in Solem v. Bartlett, 465 U.S. 463 (1984), the Tenth Circuit Court granted rehearing en banc. The en banc court, with two judges dissenting, vacated the decision of the panel and, invoking Solem, held that both the original Uintah and Uncompahgre Reservations still exist undiminished (except for two small areas not at issue here). Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985) (hereinafter referred to as Ute Indian Tribe). The State and local entities petitioned this Court for a writ of certiorari, which was denied. Utah v. Ute Indian Tribe, 479 U.S. 994 (1986).

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[2] The holding of the original Tenth Circuit Court panel is consistent with the result reached by the Utah Supreme Court in both Hagen and Perank.



**C. Statement of Facts -- State v. Hagen**

Petitioner Robert P. Hagen was charged in state district court for Duchesne County, Utah, with distribution of a controlled substance, a third degree felony under Utah law. On August 28, 1989, Petitioner pleaded guilty to the charges. The offense occurred in the Town of Myton, which is within the original exterior boundaries of the Uintah Reservation as defined by the en banc decision of the Tenth Circuit Court. Ute Indian Tribe, 773 F.2d 1087. The Town of Myton, however, is not located on Indian-owned "trust lands", but lies within the area which was restored to the public domain and opened to non-Indian settlement.[3]

Prior to sentencing, Petitioner filed a motion to arrest judgment claiming that, since he was an Indian and the crime took place within the exterior boundaries of an Indian reservation, the state court lacked jurisdiction. See 18 U.S.C. § 1151. The trial court denied the motion.

On appeal, the Utah Court of Appeals reversed, holding that Petitioner was an Indian and that Myton was within the exterior boundaries of the Uintah Reservation

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[3] The terms "Indian country" and "Indian reservation" are often used interchangeably, and refer to the area--regardless of land ownership--within the exterior boundaries of an Indian reservation. The term "trust lands" refers to lands held in trust by the United States for the exclusive use and occupation of Indians or Indian tribes. See generally Felix Cohen, Handbook of Federal Indian Law, pp. 34-44 (1982 ed.). Thus, Indian country or an Indian reservation, with attendant jurisdictional ramifications, can (depending on the situation) include non-Indian land located within the exterior boundaries of a reservation.

based on the en banc decision of the Tenth Circuit Court in Ute Indian Tribe, 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986). State v. Hagen, 802 P.2d 745 (Utah App. 1990).

The Utah Supreme Court then granted the State's petition for a writ of certiorari, and on July 17, 1992, issued its decision reversing the Utah Court of Appeals. Based on its decision the same day in State v. Perank (discussed infra), the Utah Supreme Court disagreed with the Tenth Circuit Court's decision in Ute Indian Tribe and ruled that the restoration to the public domain of unallotted and unreserved lands within the Uintah Reservation pursuant to the Act of May 27, 1902, as amended, diminished the reservation; that the Town of Myton was not within the present boundaries of the Uintah Indian Reservation; and that the state court had criminal jurisdiction over Petitioner. See Resp. App. B, p. 2a.

Petitioner Hagen filed a timely petition for certiorari with this Court, which was received by this Respondent on October 19, 1992.

**D. Statement of Facts -- State v. Perank**

A discussion of State v. Perank is included because it is a companion case to and was decided on the same day as Hagen. The opinion in Perank (Resp. App. B, p. 4a) provides the detailed analysis by the Utah Supreme Court regarding the disestablishment of the Uintah Reservation and was cited by that court as controlling



authority in State v. Hagen.[4] The Perank case was under advisement at the time the Hagen case reached the Utah Supreme Court.

In 1983, Clinton Perank--who claimed to be a Ute Indian--was charged in state district court with burglary in the Town of Myton (the same situs as Petitioner's crime), a third degree felony under Utah law. Mr. Perank pleaded guilty to the charges and was placed on probation on October 27, 1983. In 1986, after several probation violations, proceedings were initiated to revoke Mr. Perank's probation and execute the sentence previously entered by the state district court.

A probation revocation hearing was held in April of 1986. At that hearing, Mr. Perank--for the first time in any of the proceedings--asserted that the state district court lacked jurisdiction over him because he was a Ute Indian and the crime took place within the original exterior boundaries of the Uintah Reservation. Mr. Perank relied solely on the en banc decision of the Tenth Circuit Court (Ute Indian Tribe, 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986)) for the proposition that the original boundaries of the Uintah Reservation remained intact. The state district court rejected those claims and executed Mr. Perank's prison sentence.

On appeal, Mr. Perank and the State of Utah stipulated that--as to the reservation boundary issue--the record to be considered should be the same record generated in federal district court in Ute Indian Tribe (Resp. App. E, p. 163a). A similar stipulation has been

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[4] See Rule 14(k)(ii), Rules of U.S. Supreme Court.

executed in State v. Hagen (Resp. App. E, p. 164a). A copy of the record in the federal proceedings was filed in and accepted by the Utah Supreme Court. At the suggestion of the State of Utah, the Utah Supreme Court invited the Ute Tribe to file an amicus curiae brief, and also invited the United States to do the same. Both the Tribe and the United States submitted briefs. See Resp. App. B, pp. 6a-7a.

The Utah Supreme Court held that the Uintah Reservation had been diminished by the Act of Congress of May 27, 1902 (32 Stat. 245), as amended, which restored the unallotted lands within the reservation to the public domain; that the en banc decision of the Tenth Circuit Court in Ute Indian Tribe misinterpreted this Court's decision in Solem v. Bartlett, 465 U.S. 463 (1984), and that the Town of Myton was not within an Indian reservation. Therefore, the Utah Supreme Court concluded the state district court had criminal jurisdiction over Mr. Perank. See Resp. App. B, pp. 62a-63a.[5]

## REASONS FOR GRANTING THE WRIT

### I. The Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit Have Issued Conflicting Decisions on an Important Issue of Federal Law

[5] For whatever reason, Perank has decided not to join Hagen in seeking a writ of certiorari.



This is the third time since 1977 that the issue of whether the Uintah Reservation was diminished or left intact by its opening has been before this Court on a petition for writ of certiorari.[6] The issue will continue to spawn controversy, uncertainty, and repeated litigation until this Court resolves the conflict. For that reason, the State of Utah agrees with Petitioner that a writ of certiorari should issue to review the decision of the Utah Supreme Court.[7]

In Brough v. Appawora, 553 P.2d 934 (Utah 1976), vacated Mem. 431 U.S. 901 (1977), this Court granted certiorari, but summarily remanded the case for further consideration in light of Rosebud. Brough was removed to federal court without the Utah Supreme Court having had the opportunity to reconsider the issue.

[6] Actually, it is the fourth time, if one includes the petition for certiorari filed by the Ute Tribe in Ute Indian Tribe v. State Tax Commission of Utah, 574 F.2d 1007 (10th Cir. 1978), cert. denied, 439 U.S. 965 (1978). That case involved whether State sales taxes could be imposed on sales to non-Indians of products made by a tribal enterprise within the reservation boundaries. While the case turned primarily on tax principles, the lower court had ruled that the original reservation boundaries remained intact. On appeal, the Tenth Circuit reversed, holding that the record before the lower court lacked sufficient evidence for the court to determine the boundary issue. In seeking a writ of certiorari, the Ute Tribe specifically raised the boundary issue in its petition. See Ute Tribe's Petition for Certiorari, U.S. Supreme Court No. 78-292, Issues Presented for Review.

[7] While the State agrees with Petitioner that certiorari should be granted, the State will obviously take a position contrary to Petitioner on the merits.

In Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986), the United States filed an amicus curiae brief urging denial of certiorari, but conceded that the Utah courts might again be called upon to consider the boundary issue:

> The Utah Supreme Court did render a decision almost a decade ago that seemed to assume that these lands were no longer part of the Reservation [citing Brough]. But this Court, at the urging of the United States, vacated that decision and remanded for further consideration in light of Rosebud [citation omitted], and as petitioners concede . . . the diminishment issue was not resolved on remand. If the Utah Supreme Court nevertheless should adhere to its prior view in some future case, notwithstanding the intervening decision in Solem and the exhaustive consideration of the issue by the courts below, there will be time enough for this Court to grant review.

(Emphasis added.)[8]

The Utah Supreme Court--faced with a challenge to state court criminal jurisdiction in the disputed area of the Uintah Reservation in Hagen and Perank--has now revisited the issue. In deciding the boundary issue in Hagen and Perank, the Utah Supreme Court had before it virtually the identical record that was before the Tenth Circuit Court in Ute Indian Tribe (Resp. App. E, pp. 163a-165a). The Utah Supreme Court also fully considered the decisions of this Court in Rosebud, Solem, and preceding reservation disestablishment cases. However, the Utah Supreme Court reached a result opposite that of the Tenth Circuit Court of Appeals. Only this Court can resolve the present conflict.[9]

In both DeCoteau v. District County Court, 420 U.S. 425 (1975), and Solem v. Bartlett, 465 U.S. 463 (1984), this Court granted certiorari to resolve conflicting decisions regarding Indian reservation boundaries issued by the South Dakota Supreme Court and the United States Court of Appeals for the Eighth Circuit. This Court affirmed the decision of the South Dakota Supreme Court regarding the Lake Traverse Reservation in DeCoteau, and affirmed the decision of the Eighth Circuit Court regarding the Cheyenne River Reservation in Solem.

We agree with Petitioner that the current conflict between the Utah Supreme Court and the Tenth Circuit Court of Appeals regarding the boundaries of the Uintah Reservation--absent a definitive ruling by this Court--will continue to generate uncertainty, confusion and litigation

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[8] Brief for the United States as amicus curiae at pp. 14-15 in State of Utah v. Ute Indian Tribe, U.S. Supreme Court No. 85-1821 (November 1986). It would seem logical, because a conflict between the courts now exists, that the United States would now support a final resolution of the conflict by this Court.

[9] Prior to 1977, there were other state and federal cases dealing with the opening of the Uintah Reservation. See, e.g., Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910); Whiterocks Irrigation Co. v. Mooseman, 45 Utah 79, 141 P. 459 (1914); U.S. v. Boss, 160 Fed. 132 (D. Utah 1906); and Hanson v. United States, 153 F.2d 162 (10th Cir. 1946).

within a large area of northeastern Utah. See: Petition, p. 9. The jurisdictional conflicts affect federal, state, local and tribal governments and the approximately 20,000 Indian and non-Indian residents of the area.[10] Without a final determination of reservation boundaries, controversies will continue to arise as to law enforcement, state and tribal court civil jurisdiction, hunting and fishing rights, authority to levy and collect taxes, zoning regulation, environmental regulation, and the control of alcohol and gaming--just to name a few. Absent a decision by this Court, there will be continuing jurisdictional gridlock.

The conflict over the reservation boundaries and the attendant jurisdictional ramifications are not imagined or hypothetical. They are very real indeed. For example, crimes are being committed, on a fairly regular basis, within the area in controversy by or against Indians. The conflicting federal and state court decisions create forum shopping--where criminal defendants charged in state court claim they should be in federal court, and vice versa. More ominously, on or about July 31, 1992 (a mere two weeks after the Perank/Hagen decisions were issued), the Ute Indian Tribe filed a renewed motion for injunctive relief in the United States District Court for Utah, seeking, inter alia, to enjoin the Utah Supreme Court from enforcing its decisions in Perank and Hagen (U.S.D.C. Utah No. C-75-408J). This places the federal district court for Utah and the Utah Supreme Court on a direct collision course, which will be avoided if this Court agrees to grant review. The State of Utah is sensitive to

[10] At least 18,000 non-Indians live within the historic reservation boundaries. The present number of enrolled Ute tribal members is estimated at 1,500 (Resp. App. B, p. 15a, n10).



the pressures placed on this Court's docket, but only a decision by this Court can diffuse the present volatile situation on the Uintah Reservation and between the state and federal courts in Utah.

Further, the conflicting decisions of the Utah Supreme Court and the Tenth Circuit Court of Appeals provide the best opportunity for this Court to review the reservation boundary issue. Both cases were decided on the same extensive record regarding the reservation boundary, which was generated at the federal trial court level in Ute Indian Tribe (Resp. App. E, pp. 163a-165a) (see 521 F. Supp. 1072). Both courts, in considering the same record, reached different results. The extensive record below may very well go by the wayside if the boundary issue is not resolved in the petition now before this Court.

Because the decisions of the Utah Supreme Court and the Tenth Circuit Court of Appeals are in direct conflict on the same issue of federal law, this Court should grant the Petition for a Writ of Certiorari in order to resolve the important question presented.

## II. The Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit Have Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by this Court

The question presented in this Petition involves the jurisdictional status of the lands within the Uintah Indian

Reservation which were opened to settlement by the Act of May 27, 1902 (32 Stat. 245), as amended (Resp. App. D, pp. 138a-140a).[11]

As this Court has held, some surplus land acts diminished reservations (see, e.g.,Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), and DeCoteau v District County Court, 420 U.S. 425 (1975)). Others did not (see, e.g., Solem v. Bartlett, 465 U.S. 463 (1984); Mattz v. Arnett, 412 U.S. 481 (1973); and Seymour v. Superintendent, 368 U.S. 351 (1962)). Solem, 465 U.S. at 468-70. Accord: Perank, supra (Resp. App. B, pp. 16a-18a).

The importance of any diminishment decision is clear. A certain area must lie either within the jurisdiction of state courts or within the jurisdiction of federal and tribal courts. That determination is of critical importance to the general public, tribal members and law enforcement personnel.

In its disestablishment decisions, this Court has set forth a "fairly clean analytical structure" for distinguishing those surplus lands acts that of their own force effected an immediate diminishment of a particular reservation from those acts that simply permitted non-Indians to purchase land within an existing reservation--and left to another day the actual redrawing of the boundaries. Solem, 465 U.S. at 470. Since most disestablishment cases are often legally

[11] The 1902 Act is part of a series of acts of Congress which opened Indian reservation land to settlement by non-Indians. These specific acts effectuated the general policy guidelines set forth in the General Allotment Act of 1887, 24 Stat. 388, commonly known as the Dawes Act.



and factually complex, it is important that lower courts, both state and federal, faithfully apply the "clean analytical" test reiterated by this Court in Solem. A close reading of the opinions of the Utah Supreme Court in the Hagen and Perank cases demonstrates that that Court followed the correct test and, we submit, reached the correct result. On the other hand, the en banc decision of the Tenth Circuit Court of Appeals in Ute Indian Tribe misread Solem, applied the wrong test, and reached the wrong result.

We submit that the very reason this Court summarily vacated the 1977 Utah Supreme Court decision in Brough (at the urging of the United States) was because the Utah Supreme Court had not analyzed the issue with proper reference to the precedents of this Court. Now, the tables are turned and the Tenth Circuit Court has blinded itself to the clean analytical test by its misreading of Solem.

The en banc decision of the Tenth Circuit Court in Ute Indian Tribe sent a message that the analytical test for disestablishment cases was somehow changed by Solem. The Petition now before the Court provides an opportunity for this Court to reaffirm the "clean analytical" test of its prior disestablishment cases, and to correct any misinterpretations created by the Tenth Circuit Court's misreading of Solem.[12]

[12] Such a clarification from this Court is important regardless of how the Court rules on the merits of the Uintah Reservation question. Even if this Court should conclude that the Uintah Reservation was not diminished, it should correct the analytical errors contained in the Ute Indian Tribe decision.

### A. The Tenth Circuit Misread Solem and Rendered a Decision in Conflict with the Decisions of this Court and of Lower Federal Courts

1. The en banc decision of the Tenth Circuit Court that the historic Uintah Reservation was not disestablished rests on the proposition that restoration to public domain language "is not the same as a congressional state of mind to disestablish," and hence, "does not reliably establish the clear and unequivocal evidence of Congress's intent to change the boundaries" (Resp. App. C, pp. 86a-87a) (emphasis added). In so holding, the majority acknowledged that this had not been the law prior to Solem and, indeed, all of the judges who had considered this case before Solem agreed that such language was synonymous with disestablishment. See Ute Indian Tribe v. State of Utah, 716 F.2d 1298, 1302 (10th Cir. 1983); id. at 1316 (Doyle, J., dissenting); and Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072, 1122 (D.C. Utah 1981). To the en banc majority, however, Solem altered this long-standing principle of interpretation and marked a new direction in this Court's view of turn-of-the-century legislation concerning Indian reservations. Thus, the en banc majority concluded that "[u]nder the Solem standards neither the Uncompahgre Reservation nor the Uintah Reservation has been disestablished or diminished by any of the congressional enactments in question" (Resp. App. C., p. 83a).[13]

[13] To the extent that the Uncompahgre documentation is viewed in pari materia, it both re-enforces the position of the Utah Supreme Court and undermines the rationale and conclusion of Ute Indian Tribe. On this point the United States agrees with us. The United States told this Court that: "In the end, however, the court of appeals' analysis [on Uncompahgre] is unconvincing . . . the court of appeals erred in holding that the Uncompahgre Reservation was not disestablished. . . ." Brief for the United States as Amicus Curiae at 18, 20, Utah v. Ute Indian Tribe, U.S. Supreme Court No. 85-1821 (November 1986). See n.1, supra, at p. 3.



The Tenth Circuit's reading of Solem is not correct. Solem did not establish new "standards" and it did not alter the principles announced in Seymour, Mattz, DeCoteau and Rosebud, which the Court in Solem described as having "established a fairly clean analytical structure for distinguishing those surplus land Acts that diminished reservations from those Acts that simply offered non-Indians the opportunity to purchase lands within established reservation boundaries." 465 U.S. at 470. Although the Court has added several relevant factors to the traditional indicia of legislative intent, including how Congress and the Department of the Interior have treated the area in later years and whether the area has "lost its Indian character" because it is "predominately populated by non-Indians" (Solem, 465 U.S. at 471 & n.12), the Court has not departed from the governing principle "that congressional intent will control" (Rosebud, 430 U.S. at 586; Solem, 465 U.S. at 470-71).

In determining whether an Indian reservation exists, one must therefore first examine the face of the relevant legislation. Rosebud, 430 U.S. at 587. In each of the disestablishment cases decided before Solem, the Court expressly acknowledged that restoration to public domain constitutes firm and unequivocal language of disestablishment. See Rosebud, 430 U.S. at 589 & n.5; DeCoteau, 420 U.S. at 426-27, 446; Mattz, 412 U.S. at 504 n.22;

Seymour, 368 U.S. at 354-55; and U.S. v. Pelican, 232 U.S. 442, 445-46 (1914). In the clearest possible terms, the Court stated that restoration to the public domain meant "stripped of reservation status." DeCoteau, 420 U.S. at 446. The United States also has consistently taken the position that such language constituted an explicit expression of a congressional intent to disestablish.[14]

The decisions in Rosebud and DeCoteau fairly reflect the view of the Court on this point. Although in both cases the Court was divided on the question whether the particular area involved had retained reservation status, the Court was unanimous that such restoration language amounted to an unequivocal expression of an intent to disestablish. See Rosebud, 430 U.S. at 589 n.5; id. at 618 (Marshall, J., dissenting); DeCoteau, 420 U.S. at 426-27, 446; id. at 463 (Douglas, J., dissenting). Indeed, Justice Marshall (who wrote the Court's opinion in Solem) observed in his dissenting opinion in Rosebud that an 1889 surplus land act expressly restoring lands to the public domain (25 Stat. 896, § 21) was "yet another example" of "'clear language of express termination. . .'."

[14] See Memorandum for the United States as Amicus Curiae, at 12-14, Rosebud Sioux Tribe v. Kneip, No. 75-562 (April 17, 1976); Brief for the United States as Amicus Curiae, at 8, 15, & 17-18, Rosebud, supra (September, 1976); Brief for the United States as Amicus Curiae, at 10 & 16-17, DeCoteau v. District County Court, Nos. 73-1148 & 73-1500 (November 1974); Brief for the United States as Amicus Curiae, at 24, Mattz v. Arnett, No. 73-1182 (March, 1973). For instance, in Rosebud, the United States emphasized that "the clear language of other Acts expressly restoring lands to the public domain is notably absent. . . ." Brief for the United States, supra, at 8.



Id., 430 U.S. at 618.[15] Accord: Perank (Resp. App. B, pp. 21a-22a; p. 19a, n.11).[16]

Contrary to the en banc decision of the Tenth Circuit, Solem did not reject this firmly-established rule of interpretation. The crucial provision interpreted in Solem did not provide for the restoration of the surplus lands to the public domain, nor was any such language contained in the operative portions of the Solem legislation. Instead, a reference to "public domain" appeared in a subsequent section providing that tribal members could harvest timber on certain portions of the opened lands, "only as long as the land remained part of the public domain." § 9, 35 Stat. 464. The Court acknowledged that even this oblique reference was evidence of disestablishment; it found, however, that because the phrase was "isolated," it could

[15] For "additional examples," Justice Marshall cited (430 U.S. at 618) the National Indian Law Library's compilation of Allotment/Cession Statutes, which states that "[t]hose statutes we have titled 'restored to the public domain' are those which appear to have the clearest language of disestablishment. . . ." Compilation, at 2 (Doc. No. 002279) (emphasis added).

[16] The decision by this Court in United States v. Pelican, 232 U.S. 442 (1914), first dealt specifically with "restored to the public domain" language in legislation opening a portion of the Colville Reservation. Pelican is also important because it was decided at a time contemporaneous with many of the reservation openings. In Pelican, Congress provided that the north half of the Colville Reservation was to be "vacated and restored to the public domain"--to be disposed of under applicable public land laws. Prior to the opening, Indians were given individual allotments. This Court held that the restoration of the lands to the public domain diminished the north half of the reservation, except for any Indian allotments, which remained "Indian Country." Pelican, 232 U.S. at 445-46.

not be dispositive. Solem, 465 U.S. at 475. Accord: Perank (Resp. App. B, pp. 22a-23a).

In justifying its expansive interpretation of Solem, the en banc majority also relied upon a footnote in Solem that stated there was "considerable doubt as to what Congress meant in using. . ."public domain terminology in the Solem legislation since the affected lands "could be conceived of as being in the 'public domain' inasmuch as they were available for settlement" (id., 465 U.S. at 475 n.17). It is evident, however, that the Court did not intend this statement in Solem to overrule its prior decisions and to discount the significance of public domain language in every other instance. The Court had already indicated that such language supported the disestablishment claim and, in any event, the Court would hardly have confined its comments to one sentence in a footnote had it intended such a drastic departure from the views, expressed by both the majority and dissenting Justices in the prior cases, regarding the significance of such restoration language.

The Tenth Circuit Court's decision to the contrary also overlooks the Solem Court's later observation, in the context of subsequent jurisdictional history, that:

> "Unentered lands were considered a part of the reservation. They were available for allotment to tribal members, they were leased for the benefit of the tribe, and they were specifically defined as different from land in public domain."



Id. at 480, n.25 (emphasis added), quoting F. Hoxie, Jurisdiction on the Cheyenne River Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908, at 87 (undated). The reference to public domain in the quoted passage can only be understood to mean that public domain and reservation status are mutually exclusive.[17] In short, Solem does not, as the en banc majority in Ute Indian Tribe believed, signal this Court's abandonment of its previous interpretations of restoration to public domain language. Such language continues to be the clearest expression of disestablishment and the Tenth Circuit erred in holding otherwise.

2. Since the Ute Indian Tribe decision, a recent opinion by a panel of the Tenth Circuit seriously questions the analysis of Solem by the en banc majority of the Tenth Circuit Court in Ute Indian Tribe. The case of Pittsburg & Midway Coal Mining Company v. Yazzie, 909 F.2d 1387 (10th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 581 (1990) (hereinafter Yazzie), decided whether a portion of the Navajo Reservation in New Mexico had been disestablished.

As opposed to Ute Indian Tribe, the Yazzie decision gives the proper emphasis to the "restored to the public domain" language used in the specific act opening

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[17] This is how the author of the quoted study understood it, as he considered public domain status to be crucial in interpreting the subsequent jurisdictional treatment of the area involved. See Hoxie, at 87-88. Thus, he stated that it was necessary to determine whether the area in question was "administered as part of the public domain. . . ." Id., at 87.

a reservation to entry. The Tenth Circuit panel in Yazzie correctly reads Solem and gives "restored to the public domain" language its proper consideration as an important part of the analytical test for disestablishment of Indian reservations, and a clear indication of congressional intent to disestablish. Yazzie, 909 F.2d at 1397-1405. Indeed, the Yazzie panel was openly critical of the treatment of the "public domain" language in Ute Indian Tribe:

> Our conclusion in Ute that the generic phrase ["restore to the public domain"] was ambiguous is undercut . . . by our conflicting statement earlier in the same opinion that public domain language implies "a wholesale diminishment of the Reservation." Moreover, our conclusion [in Ute Tribe] is unexamined and unsupported in the opinion.

Yazzie, 909 F.2d at 1400 (emphasis added).

3. The Ute Indian Tribe decision is also at odds with the decisions of other courts of appeals in disestablishment cases. The Eighth and Ninth Circuits, in a long line of decisions, have consistently recognized that restoration to public domain language is an explicit expression of congressional intent to disestablish.[18] The significance

[18] See, e.g., Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 90 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977); United States ex rel. Feather v. Erickson, 489 F.2d 99, 100 (8th Cir. 1973), rev'd on other grounds sub nom. DeCoteau v. District County Court, 420 U.S. 425 (1975); United States ex rel. Condon v. Erickson, 478 F.2d 684, 687-88 (8th Cir. 1973); Beardslee v. United States, 387 F.2d 280, 285 (8th Cir. 1967)(Blackmun, J.); DeMarrias v. South Dakota, 319 F.2d 845, 846 (8th Cir. 1963); Russ



these decisions accorded to restoration to public domain language has a sound historical foundation and follows well-established principles regarding the public lands (see Resp. App. C, pp. 115a-116a (Seth, J., dissenting)). Long before the acts in question here, it was settled law that when the federal government appropriates or reserves a tract for any purpose, such as an Indian reservation, the tract is thereby severed from the public domain. That is, it loses its status as public lands.[19] Contrary to the Tenth

v. Wilkins, 624 F.2d 914, 915, 924 & 927-29 (9th Cir. 1980)(Hoffman, J., dissenting), cert. denied, 451 U.S. 908 (1981); United States v. Southern Pacific Transportation Co., 543 F.2d 676, 696 (9th Cir. 1976). See also Lower Brule Sioux Tribe v. State of South Dakota, 711 F.2d 809, 817 n.8 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984); United States ex rel Cook v. Parkinson, 525 F.2d 120, 124 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); Putnam v. United States, 248 F.2d 292, 295 (8th Cir. 1957).

District court and state court decisions in the disestablishment context have been to the same effect. See, e.g., Russ v. Wilkins, 410 F. Supp. 579, 581-82 (N.D. Cal. 1976), rev'd on other grounds, 624 F.2d 914 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); United States ex rel Condon v. Erickson, 344 F. Supp. 777, 778 (D.S.D. 1972), aff'd, 478 F.2d 684 (8th Cir. 1973); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1005 (D. Minn. 1971); Stankey v. Waddell, 256 N.W.2d 117, 119 (S.D. 1977); Wood v. Jameson, 130 N.W.2d 95, 99 (S.D. 1964); Lafferty v. State, 125 N.W.2d 171, 174 (S.D. 1963).

[19] See, e.g., Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 513 (1839); Leavenworth, Lawrence, and Galveston Railroad Co. v. United States, 92 U.S. 733, 745 (1875); Hastings and Dakota Railroad Co. v. Whitney, 132 U.S. 357, 360-61 (1889); Bardon v. Northern Pacific Railroad Co., 145 U.S. 535, 539 (1892); Spalding v. Chandler, 160 U.S. 394, 404-05 (1896); Gibson v. Anderson, 131 Fed. 39, 41-42 (9th Cir. 1904); United States v. Tichenor, 12 Fed. 415, 421 (D. Ore. 1882); Kansas Pacific Ry. Co. v. Atchison, Topeka & Santa Fe R.R. Co., 13 Fed. 106, 107 (D. Kan. 1881); United States v. Payne, 8 Fed. 883, 893-94 (W.D. Ark. 1881). "Public domain" and "public lands" traditionally have been

Circuit en banc majority's view, because the reservation of a tract removed it from the public domain,[20] later restoration of the tract to the public domain firmly signified the end of reservation status. Yazzie, 909 F.2d at 1402-04.[21]

In sum, the Tenth Circuit Court's interpretation of Solem in Ute Indian Tribe is inconsistent with the decisions of this Court and the lower federal courts in Indian boundary cases and, in fact, has been questioned by the more recent decision of the Tenth Circuit panel in Yazzie, supra.[22]

### B. The Decisions of the Utah Supreme Court in Hagen/Perank Applied the Correct Analytical Test Set Forth in Solem

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regarded as "equivalent" concepts. Barker v. Harvey, 181 U.S. 481, 490 (1901).

[20] As the Solicitor of the Department of the Interior explained years later in regard to the original Uintah Reservation, "[a]lthough the . . . reservation had been created out of the public domain, the land comprising it did not occupy the status of public domain land while included within the reservation. . . ." Solicitor Opinion M-36051 at 5 (December 7, 1950).

[21] See Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942).

[22] Ute Indian Tribe also ignored other relevant components of the clear analytical test by ignoring subsequent administrative treatment and the demographic history of the opened area. Solem, 465 U.S. at 471-72.



Contrasted with the Tenth Circuit's en banc decision in Ute Indian Tribe, the Utah Supreme Court faithfully followed the "clean analytical structure" for determining reservation disestablishment set forth in Solem and the preceding decisions of this Court.[23]

The Utah Supreme Court carefully examined all of this Court's recent disestablishment cases, and gave the proper emphasis to the "restored to public domain" language which clearly appeared in the operative section of the 1902 Act (Perank, Resp. App. B, pp. 13a-28a; 1902 Act, Resp. App. D, p. 138a).

The Perank decision further contains a detailed analysis of presidential proclamations regarding the opening of the Uintah Reservation and contemporaneous and subsequent executive branch treatment of the opened area ignored by the Ute Indian Tribe decision--all of which supports a conclusion of disestablishment (see e.g., Resp. App. B, pp. 44a-61a). For example, the Utah Supreme Court examined the Presidential Proclamation of July 14, 1905, which actually set the date for opening the reservation, and specifically referred to the 1902 Act as restoring the surplus lands to the public domain. Perank, Resp. App. B, p. 45a; Proc., Resp. App. D, p. 155a. The Utah Supreme Court viewed the proclamation as an unambiguous and contemporaneous statement by the

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[23] We also submit that the original panel decision of the Tenth Circuit Court, as well as the decision in Yazzie, supra, applied the correct analysis. Compare Hagen/Perank to Ute Indian Tribe v. State of Utah, 716 F.2d 1298 (10th Cir. Three-Judge Panel, 1983) and Yazzie, 909 F.2d 1387 (10th Cir. 1990).

Nation's Chief Executive and entitled to significant weight. Rosebud, 430 U.S. at 602-03.[24]

Moreover, in its Hagen/Perank decisions, the Utah Supreme Court finally had an opportunity to do what this Court told it to do on remanding Brough in 1977 (431 U.S.901)--to re-examine the Uintah Reservation boundary issue in light of this Court's decisions. The Perank decision contains a detailed discussion of Solem and preceding cases and a complete analysis of the weight to be given "restored to the public domain" language. Other parts of the analytical test were also carefully considered. We further submit that the Utah Supreme Court reached the correct result.

## CONCLUSION

For the foregoing reasons, Respondent State of Utah urges that the Petition for a Writ of Certiorari be granted.

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[24] The Utah Supreme Court also examined the Presidential Proclamation of 1906 (34 Stat. 3228), which adopted the same construction of the operative acts as the 1905 proclamation and, for the first time, referred to the "former Uintah Indian Reservation." Perank, Resp. App. B, p. 47a.



Respectfully submitted,

R. PAUL VAN DAM
Attorney General of Utah
JAN GRAHAM
Utah Solicitor General
DAVID B. THOMPSON
Assistant Attorney General
MICHAEL M. QUEALY
**(Counsel of Record)**
Assistant Attorney General
Attorneys for Respondent
State of Utah

# APPENDIX

**APPENDIX A**

In the SUPREME COURT of the STATE OF UTAH

----ooOoo----

State of Utah,
Plaintiff and Petitioner,

v.

Robert Hagen,
Defendant and Respondent.

No. 910017

F I L E D
July 17, 1992

Geoffrey J. Butler, Clerk

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Eighth District, Duchesne County
The Honorable Dennis L. Draney

Attorneys: R. Paul Van Dam, David B. Thompson, Michael M. Quealy, Salt Lake City, for plaintiff
Joel Berrett, Roosevelt, for defendant

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On Certiorari to the Utah Court of Appeals

DURHAM, Justice:

Defendant Robert Hagen pleaded guilty in Eighth District Court to distributing a controlled substance, a third degree felony under Utah Code Ann. § 58-37-8(1)(b)(ii) (Supp. 1991). The plea affidavit stated that

defendant sold marijuana from his residence in Myton, Duchesne County, Utah. Prior to sentencing, defendant moved to arrest judgment and to withdraw his guilty plea. In his motion, he challenged the court's jurisdiction on the basis that he was an Indian and his alleged crime occurred in Indian country, the Uintah-Ouray Reservation, and was thus not subject to state court jurisdiction. Federal law provides for exclusive federal jurisdiction over a defendant who is an American Indian and who commits a criminal offense in Indian country.[1] 18 U.S.C. §§ 1152, 1153 (1988). The court denied the motion. Defendant subsequently appealed the conviction to the Utah Court of Appeals. The court of appeals reversed defendant's conviction, holding that a 1985 Tenth Circuit decision had conclusively determined that Myton was in Indian country and holding that the State had failed to meet its burden of disproving defendant's personal Indian status. We issued a writ of certiorari to review the decision of the court of appeals.

We conclude that the court of appeals erred in treating Myton as Indian country. This court's opinion today in State v. Perank, No. 860254, slip op. (Utah July 17, 1992), establishes that for purposes of criminal jurisdiction, Myton, Utah, is not in Indian country. See id. at 9 n.10; id. at 41. In Perank, we held that 1902 and 1905 congressional acts diminished the original Uintah Indian Reservation boundaries and that subsequent homesteading and settlement therefore occurred on lands restored to the public domain. See id. at 8, 19-29. We concluded that

[1] There are certain exceptions to this general grant of jurisdiction. These exceptions, however, are not relevant to the disposition of this case.



Myton, Utah, where defendant's alleged criminal conduct occurred, is therefore not in Indian country. See id. at 41. Thus, in the instant case defendant's criminal conduct in Myton may form the basis of state court jurisdiction, regardless of defendant's personal Indian status. We therefore reverse the decision of the court of appeals and reinstate defendant's conviction.

Reversed.

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WE CONCUR:

Gordon R. Hall, Chief Justice

Richard C. Howe, Associate Chief Justice

I. Daniel Stewart, Justice

Zimmerman, Justice, dissents.

**APPENDIX B**

In the SUPREME COURT of the STATE OF UTAH

----ooOoo----

State of Utah,
Plaintiff and Appellee,

v.

Clinton Perank,
Defendant and Appellant.

No. 860243
F I L E D
July 17, 1992

Geoffrey J. Butler, Clerk

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Seventh District, Duchesne County
The Honorable Richard C. Davidson

Attorneys: David L. Wilkinson, Earl F. Dorius, Michael M. Quealy, Dallin W. Jensen, Salt Lake City, for State of Utah
Kirk C. Bennett, West Valley, for Perank
Alvin G. Nash, Vernal, Herbert W. Gillespie, Duchesne, Tom D. Tobin, Alvin Pahlke, Susan W. Pahlke, Winner, South Dakota, for Amici Duchesne County and Uintah County
Stephen G. Boyden, Salt Lake, for Amicus Ute Indian Tribe

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STEWART, Justice:

Clinton Perank was convicted in a state court of committing a burglary in Myton, Utah, in violation of Utah Code Ann. § 76-6-202 (1978), and placed on probation. The court thereafter revoked his probation and ordered him committed to the Utah State Prison for a term of 0-5 years. Perank appealed from the revocation of probation, and we stayed execution of the sentence pending appeal.[1]

Perank argues that the state trial court lacked jurisdiction to convict him of burglary and that the Ute Tribal Court had exclusive jurisdiction because he is an Indian and the offense occurred within Indian country. Two issues are presented: (1) whether Perank is an Indian and (2) whether the Uintah-Ouray Indian Reservation was diminished by an act of Congress, leaving Myton, Utah, outside the jurisdictional boundaries of that Reservation.

Even though Perank pleaded guilty to the burglary charge and did not raise the issue of lack of subject matter jurisdiction with respect to the burglary until the probation revocation proceeding, the issue is properly before this Court. A plea of guilty does not waive a claim that the court lacks power to adjudicate a charge against the defendant. Blackledge v. Perry, 417 U.S. 21, 30-31 (1974); see also 1 Charles A. Wright, Federal Practice and Procedure § 175, at 623-33 (1982). Also, the issue of subject matter jurisdiction can be raised at any time. See

[1] Appellate jurisdiction of this case would ordinarily lie with the Utah Court of Appeals. See Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1988). Because of the importance of the question presented, the Court of Appeals certified the case to this Court.



Glasmann v. Second District Court, 80 Utah 1, 7, 12 P.2d 361, 363 (1932).

This Court invited the United States Department of Justice to file an amicus curiae brief in this case because of the importance of the issue of the location of the boundaries of the Uintah-Ouray Indian Reservation (sometimes hereinafter "Uintah Reservation") and because the Department had filed an amicus brief in opposition to the State of Utah's petition for certiorari to the United States Supreme Court from a decision of the United States Court of Appeals for the Tenth Circuit which held that the Uintah Reservation had not been diminished under a series of congressional acts from 1902 to 1905. See Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). The Department of Justice submitted to this Court a copy of the amicus brief it filed for the United States opposing the State's petition for certiorari in Ute Indian Tribe. In that brief, the Department stated, inter alia, that the issues presented in the petition for a writ of certiorari did not require review by the Supreme Court at that time because they could be addressed in a later case if the Utah Supreme Court were to disagree with the Tenth Circuit.[2]

[2] The Department of Justice in its amicus brief failed to recognize that the Tenth Circuit's en banc decision in Ute Indian Tribe was in conflict with prior decisions of this Court. See Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910); White Rocks Irrigation Co. v. Mooseman, 45 Utah 79, 141 P. 459 (1914). The Department referred only to Brough v. Appawara, 553 P.2d 934 (Utah 1976), which was vacated and remanded for further consideration. Brough v. Appawara, 431 U.S. 901 (1977). No further opinion was rendered by this Court in Brough. The Department's brief stated, "If the Utah Supreme Court nevertheless should adhere to its prior view in some future case, notwithstanding the

The Ute Indian Tribe, also at our invitation, filed an amicus brief, but addressed only the issue of whether Perank is an Indian within the meaning of 18 U.S.C. § 1152. We note that neither Perank, the Department of Justice, nor the Tribe suggests that the Tenth Circuit's en banc decision in Ute Indian Tribe has res judicata effect in this case.[3]

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intervening decision in Solem and the exhaustive consideration of the issue by the courts below, there will be time enough for this Court to grant review." Brief for the United States in opposition as Amicus Curiae, Utah v. Ute Indian Tribe, on petition for writ of certiorari to United States Court of Appeals for the Tenth Circuit, No. 85-1821, October Term 1986, at 14-15.

[3] Res judicata is an affirmative defense in both criminal and civil cases and therefore is waivable. See Utah R. Civ. P. 8(c), 12(h); Rothey v. Walker Bank & Trust Co., 754 P.2d 1222, 1225 (Utah 1988); Manger v. Davis, 619 P.2d 687, 692 (Utah 1980); Jackson v. Rich, 499 P.2d 279, 280 (Utah 1972); Williams v. Oklahoma, 358 U.S. 576, 585 (1959); Louisville v. Nashville R.R. v. M/V Bayou Lacombe, 579 F.2d 496, 471 n.1 (5th Cir. 1979); Parks v. Pavkovic, 753 F.2d 1397, 1404 (7th Cir. 1985); State v. Hall, 383 P.2d 602, 611-12 (Idaho 1963). Even if the defense had been been raised in this case, its application against the State of Utah would be problematic. Although we have held that collateral estoppel does not require mutuality of parties when used defensively against private litigants, see Robertson v. Campbell, 674 P.2d 1226, 1230 (Utah 1983); Searle Brothers v. Searle, 588 P.2d 689, 690-91 (Utah 1978), we have not decided whether the doctrine of nonmutual collateral estoppel applies against the State. Federal law generally requires full mutuality of parties when collateral estoppel is applied against the government. See United States v. Mendoza, 464 U.S. 154 (1984); see also United States v. Stauffer Chemical Co., 464 U.S. 165, 169 (1984); Allen v. McCurry, 449 U.S. 90 (1980); Montana v. United States, 440 U.S. 147, 155-62 (1979); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 (1948). Nonmutual collateral estoppel does not apply against the government because of overriding policy



## I. PERANK'S INDIAN STATUS

State criminal jurisdiction does not extend to Indians who commit crimes in Indian country. See 18 U.S.C. §§ 1152, 1153 (1982 & Supp. 1991).[4] Federal statutes, however, do not define the term "Indian" for jurisdictional purposes. Although the State concedes that Perank is an Indian, the Tribe, as amicus, argues that he is not. Ordinarily, an amicus may only present arguments pertaining to issues properly raised by the parties before the court. However, because this issue goes to subject matter jurisdiction, we will address it.

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considerations. Mendoza, 464 U.S. at 163-64. The rule requiring full mutuality of parties has also been required with respect to estopping state governments. See Hercules Carriers, Inc. v. Florida, 768 F.2d 1558, 1577-82 (11th Cir. 1985). See generally Restatement (Second) of Judgments § 28 (1982); 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4425 (1981 & Supp. 1992). As the Utah cases cited in footnote 2 indicate, the issue of reservation diminishment can arise in a number of civil contexts in which the State of Utah is not a party, and rather than delay a decision on an issue of such substantial public importance that will inevitably recur, we think it appropriate to address the diminishment question, even if res judicata were otherwise applicable against the State.

[4] A complex set of rules governs criminal jurisdiction in Indian country. See generally Felix S. Cohen, Handbook of Federal Indian Law 34-38, 286-304, 335-41 (1982); Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503 (1976); Scott W. Wilson, Criminal Jurisdiction in Montana Indian Country, 47 Mont. L. Rev. 513 (1986); Paul S. Volk, Note, The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction Over Crimes By and Against Reservation Indians, 20 New Eng. L. Rev. 247 (1984-85); K. Bliss Adams, Note, Order in the Courts: Resolution of Tribal/State Criminal Jurisdictional Disputes, 24 Tulsa L.J. 89 (1988).

The Tribe argues that Perank is not an Indian under the jurisdictional statute because he was not officially enrolled as a member of the Tribe at the time of the burglary. We disagree and hold that Perank was an Indian at the time of the crime for purposes of 18 U.S.C. §§ 1152, 1153.[5]

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[5] Section 1152 of the United States Code provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Section 1153 of the Code provides:

> Any Indian who commits against the person or property of another Indian or another person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.



United States v. Rogers, 45 U.S. (4 How.) 567, 572-73 (1846), set forth two factors to be evaluated in determining who is an Indian. A person is an Indian who (1) has a significant degree of Indian blood and (2) is recognized as an Indian by a tribe or society of Indians or by the federal government. See United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976), cert. denied, 429 U.S. 1099 (1977); St. Cloud v. United States, 702 F. Supp. 1456, 1460 (D.S.D. 1988); State v. LaPier, 790 P.2d 983, 986 (Mont. 1990); State v. Attebery, 519 P.2d 53, 54 (Ariz. 1974); see also Ex parte Pero, 99 F.2d 28, 30-32 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939); Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 515-16 (1976).[6]

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> In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

[6] While federal criminal statutes do not define the term "Indian," 25 U.S.C. § 479 (1983) defines Indian for the purposes of land ownership and allotment:

> The term "Indian" as used in [various sections of Subchapter V--Protection of Indians and Conservation of Resources] shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

We turn to the first factor, whether Perank has a significant degree of Indian blood. As the son of a full-blood Ute father and a mixed-blood mother, Perank has more than one-half Indian blood and at least one-half Ute blood, which is sufficient to satisfy the first requirement under Rogers. Persons with less than one-half Indian blood have been held to have a significant degree of Indian blood. See, e.g., St. Cloud, 702 F. Supp. at 1460-61 (holding 15/32 Yankton Sioux blood sufficient to establish the first Rogers requirement and citing four cases which held less than 1/2 Indian blood to be sufficient); Makah Indian Tribe v. Clallam County, 440 P. 2d 442, 444 (Wash. 1968) (1/4 Indian blood sufficient).

Perank has also been recognized as an Indian by both the Tribe and the federal government. Although Perank was not formally enrolled in the Ute Tribe at the time of his conviction, lack of enrollment does not determine Indian status for purposes of jurisdiction. See Ex parte Pero, 99 F.2d at 31; St. Cloud, 702 F. Supp. at 1461; LaPier, 790 P.2d at 987. Nevertheless, the Tribe formally recognized Perank as an Indian and as a member of the Tribe by his enrollment in the Tribe at a later date. Moreover, under the terms of the Ute Indian Tribe Constitution, it appears that Perank was a member of the Ute Tribe at the time of the offense. Article II, section 1(b) of the Constitution provided that a child born to a member of the Tribe living on the Reservation at the time

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Perank would be considered an Indian under this provision because he has one-half or more Indian blood. The definition of the term "Indian" may vary, however, depending on the context for which Indian identity is relevant. See Felix S. Cohen, Handbook of Federal Indian Law 19-20 (1982).



of the birth is entitled to membership. That provision states:

> Section 1. The membership of the Ute Indian Tribe of the Uintah and Ouray Reservation shall consist as follows:
>
> . . . .
>
> (b) All children born to any member of the Ute Indian Tribe of the Uintah and Ouray Reservation who is a resident of the Reservation at the time of the birth of said children.

Ute Indian Tribe of the Uintah and Ouray Reservation Const. art. II, § 1.[7] Perank's father was an enrolled member of the Tribe and resided on the Reservation when Perank was born.[8] In Chapoose v. Uintah And Ouray Tribal Business Committee, Civ. No. 133-77, slip op. at 16-19 (Ute Tribal App. Ct. Jan. 22, 1981), the Ute Tribal Appellate Court held that Tribe membership was an automatic right for those who qualified under article II, section 1 of the Ute Constitution. Enrollment merely formalized the right.

In addition, according to an affidavit filed by Perank in the trial court, he has lived as an Indian by maintaining social, political, and spiritual relations as an Indian,

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[7] We take judicial notice of the Tribal Constitution pursuant to Rule 20(b) of the Utah Rules of Evidence. This provision of the Constitution was amended in 1988.

[8] These facts are taken from affidavits of Perank's parents submitted in the revocation proceeding.

including participation in Indian rituals. In his brief, he states that he "has lived his life as an Indian, and has been treated as an Indian by governmental entities." Also, in January 1986, Perank was convicted of three offenses in the Ute Tribal Court.

On these facts, we conclude that Perank carried his burden of factually establishing that he has been "recognized racially" as a Ute Indian. Accordingly, we hold that Perank is an Indian for the purpose of determining jurisdiction under 18 U.S.C. §§ 1152 and 1153.

## II. THE BOUNDARIES OF THE UINTAH-OURAY RESERVATION

The next issue is whether Myton, Utah, the site of the burglary, lies within Indian country, i.e.,within the boundaries of the Uintah-Ouray Reservation. If so, the district court lacked jurisdiction over the crime under 18 U.S.C. § 1152.[9] There are two contentions: first, that Myton is not within the Uintah-Ouray Reservation because the Reservation was diminished by a 1902 congressional Act as amended and supplemented by subsequent Indian Appropriation Acts in 1903, 1904, and 1905, and second, that the 1905 Act opened the Reservation without regard to the 1902 Act and that the language of the 1905 Act left the boundaries of the Reservation intact.

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[9] 18 U.S.C. § 1152 precludes the exercise of state jurisdiction over crimes committed by Indians in Indian country, and section 1151 defines Indian country to include all land within a reservation. See supra note 5.



Resolution of the diminishment issue turns on two issues. The first is whether the language of the Act of May 27, 1902, which provided that the unallotted lands were to be "restored to public domain," if used as operative statutory language opening a reservation would effect a diminishment of that reservation as to the lands so restored. The second issue is whether, as a matter of statutory construction, the operative language in the 1902 Act, "restored to the public domain," remained in effect as operative statutory language when the Reservation was finally opened in 1905.

We hold that the restoration language in the 1902 Act established the necessary congressional intent to diminish the Reservation as to those lands restored to the public domain and that the restoration language in the 1902 Act remained operative statutory language when the Reservation was opened in 1905.

For clarity, we observe that all parties agree that the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use. These lands are collectively referred to as "trust lands." Furthermore, it is an undisputed fact that approximately 1,010,000Reservation acres were withdrawn and attached to what are now the Ashley and Uintah National Forests by presidential proclamation, pursuant to the 1905 Act. The legal status of these lands is not at issue here, nor is the legal status of the Uncompahgre Reservation, a neighboring reservation in eastern Utah. In 1948, Congress added to the Reservation 510,000 acres known as the Hill Creek Extension. Act of March 11, 1948, 62 Stat. 72. The status of that land is likewise not at issue. We note that the en banc decision

in Ute Indian Tribe held that the land added to the Uintah National Forest remained in the Reservation and that the Uncompahgre Reservation was not disestablished. 773 F.2d 1089-90; id. at 1099-1101 (Seymour, J., concurring). The only issue in this case, therefore, is whether the unallotted and unreserved lands that were opened to entry in 1905 and not later restored to tribal ownership and jurisdiction by the 1945 "Order of Restoration" are within the present boundaries of the Reservation.[10]

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[10] In 1902, the Uintah Reservation contained approximately 2,039,040acres. The federal government in 1905 withdrew 1,010,000 acres as an addition to the Uintah National Forest. The allotments to individual Indians under the 1902 Act and the lands reserved for grazing and other purposes set aside for the Tribe by a 1902 Joint Resolution and the 1903 and 1905 Acts make up approximately 360,000 acres. An executive "Order of Restoration" under the authority of the Act of June 18, 1934, 48 Stat. 984, restored to the Tribe in 1945 both the title and tribal jurisdiction to over 217,000 acres that had been previously opened and restored to the public domain in 1905. This Order is discussed later in the text. In 1948, Congress added to the Uintah Reservation the Hill Creek Extension, which contained approximately 510,000acres of the former Uncompahgre Reservation. At present, the Uintah Reservation, including the trust lands, the lands restored to tribal jurisdiction by the Order of Restoration, and the lands added to the Reservation by the Hill Creek Extension, total approximately 1,087,000acres. If the 1,010,000acres of Reservation land that were set apart as an addition to the Uintah Forest Reserve but held to be part of the Reservation in Ute Indian Tribe are added to the 1,087,000acres, the Reservation today is larger than it was in 1902, before the restoration of the unallotted lands to the public domain.

There are approximately 1,500enrolled members of the Ute Tribe. Ute Indian Tribe, 773 F.2d at 1105 (Seth, J., dissenting). The tribal seat of government is located at Fort Duchesne, Utah, which is located on trust lands. Most of the lands opened for settlement under the 1905 Act were in Duchesne County. Some 18,000non-Indians now live in the area that the State asserts was disestablished, and only about 300



A. Congressional Intent to Diminish

In 1887, Congress initiated a significant change in policy toward the Indians. The new policy was designed to integrate the Indians into white, agrarian society and ultimately to do away with the reservation system. The General Allotment Act of 1887, ch. 119, 24 Stat. 388, authorized the President to allot parcels of reservation lands to Indians and, with tribal consent, to sell the unallotted, or surplus, reservation lands to non-Indians. Thereafter, Congress from time to time enacted special legislation to ensure that a particular reservation was in fact opened to allotment. Mattz v. Arnett, 412 U.S. 481, 497 (1973).

Questions subsequently arose regarding whether Congress in opening an Indian reservation, or a portion of it, to entry and settlement by non-Indians intended to leave the reservation boundaries intact so that the land opened to settlement remained within the boundaries of the reservation or whether the opening was also intended to diminish the reservation boundaries, thereby placing the opened land outside the reservation In Solem v. Bartlett, 465 U.S. 463, 468 (1984), the Court explained why Congress in enacting the surplus land acts around the turn of the century often did not make its intent with respect to diminishment explicit:

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Indians, not all of whom are members of the Ute Tribe, live in that same area. The two towns where the bulk of the non-Indian population reside, Roosevelt and Duchesne, are in the disputed area that the State contends is not subject to tribal jurisdiction. Myton is also in that area.

Unfortunately, the surplus land Acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When the surplus land Acts were passed, the distinction seemed unimportant. The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians. Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries. See Act of June 25, 1948, ch. 645, § 1151, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (1982 ed.). . .).

Another reason why Congress did not concern itself with the effect of surplus land Acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, Members of Congress voting on the surplus land Acts believed to a man that within a short time--within a generation at most--the Indian tribes would enter traditional American society and the reservation system would cease to exist. Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation.



As a consequence, each surplus land act must be examined to determine whether Congress intended to reduce the reservation's boundaries because each act employed its own statutory language, "the product of a unique set of tribal negotiation and legislative compromise." Solem, 465 U.S. at 467. Accordingly, the effect of a given surplus land act depends on the language of the act and the circumstances underlying its passage. Id. at 469.

The most probative evidence of whether Congress intended to diminish a reservation is the language used in the statutory scheme opening the reservation. Solem, 465 U.S. at 470. In addition to the intent derived from the face of the act, the surrounding circumstances and the legislative history are to be examined in determining congressional intent. Rosebud Sioux Tribe v. Kneip, 430 U.S.,584, 587 (1977) (citing Mattz v. Arnett, 412 U.S. 481, 505 (1973)). Subsequent treatment of the opened lands by Congress, federal agencies, and local authorities, Solem, 465 U.S. at 471, and subsequent jurisdictional history of the opened lands, Rosebud, 430 U.S. at 603-05; DeCoteau v. District County Court, 420 U.S. 425, 442-44 (1975), may also be useful in resolving the issue of congressional intent to diminish. Congress, however, must have clearly evinced an intent to change the boundaries before diminishment will be found. Solem, 465 U.S. at 470. And although doubtful language should be construed in favor of the Indians and against diminishment, this rule of construction does not dictate a determination that reservation boundaries were not diminished when there is a clear intent to the contrary. See Rosebud, 430 U.S. at 587.

A variety of operative statutory phrases have been held to effect diminishment. See Rosebud, 430 U.S. at 683-84 (Marshall, J., dissenting);[11] Russ v. Wilkins, 624 F.2d 914, 921-22 (9th Cir. 1980); United States v. Parkinson, 525 F.2d 120, 122-24 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). No specific talismanic statutory language is required to conclude that Congress intended to diminish a reservation. See Solem, 470 U.S. at 471, and it is not necessary that statutory language expressly sever tribal jurisdiction to effectuate a diminishment. See Rosebud, 430 U.S. at 586-605; see also Solem, 465 U.S. at 469 n.10. Also, a congressional scheme to diminish need not provide for unconditional compensation or a fixed sum to be paid to the Indians for land to be detached from the reservation. Solem, 465 U.S. at 471; Rosebud, 430 U.S. at 596 n.18. Nor must a scheme to diminish provide for Indian consent. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Solem, 465 U.S. at 470 n.11; Rosebud, 430 U.S. at 587.

Statutory language that merely provides for allotments to be made to the Indians and "opens" the remaining reservation lands to settlement by non-Indians does not demonstrate a congressional intent to diminish the

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[11] In his dissent in Rosebud, Justice Marshall cited four specific examples of clear language of express termination: (1) "'the Smith River reservation is hereby discontinued'"; (2) "'a portion of the Colville Indian Reservation . . . is hereby, vacated and restored to the public domain'"; (3) "'the reservation lines at the said Ponca and Otoe and Missouria Indian Reservation . . . are hereby abolished'"; and (4) part of the Great Sioux Reservation was "'restored to the public domain.'" Rosebud, 430 U.S. at 618 (Marshall, J., dissenting). In addition, Justice Marshall noted that an Indian library compilation contained eleven additional examples of express termination language taken from statutes enacted between 1888-1913. Id. at 618 n.3.



boundaries of a reservation. Rosebud, 430 U.S. at 586-87; Mattz v. Arnett, 412 U.S. 481, 497 (1973); Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 355-58 (1962).

Cession-type language has, however, been held in several cases to establish the requisite intent to diminish. In DeCoteau v. District County Court, 420 U.S. 425 (1975), the statute at issue ratified an agreement between the United States and the Sisseton and Wahpeton bands of Sioux Indians whereby the Indians agreed to "'cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in'" the unallotted lands of the Reservation. The Court held that this language was precisely suited to termination of the Reservation boundaries. Id. at 445. Similarly, in Rosebud, the Court held that cession-type language in 1904 Act pertaining to a part of the Sioux Reservation manifested a congressional intent to disestablish, even though the cession language was technically misused in that it implied a bilateral agreement and Congress had acted unilaterally in diminishing the Reservation. Rosebud, 430 U.S. at 587-88.

Statutory language that opens reservation lands to public entry and "restores" those lands to the "public domain" has also been recognized in a number of Supreme Court cases to effectuate a diminishment of reservation boundaries as to such lands. In Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 354 (1962), the Court stated that an 1892 Act that "vacated and restored to the public domain" the north half of the Colville Indian Reservation diminished the bound-

aries as to that part of the Reservation.[12] By contrast, the 1906 Act directly at issue in Seymour merely opened the south half of the Reservation to public entry. Because the 1906 Act contained no language restoring the land to the public domain, there was no diminishment as to the south half. Thus, the premise of the opinion in Seymour was that restoration of reservation land to the public domain constitutes a diminishment.

In Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942), the issue was whether the United States had to pay the Indians compensation for lands that had been added to the Sioux Reservation for Indian use by executive order and later detached from the Reservation and "restored to the public domain," by executive order. An implicit assumption of the opinion is that the land restored to the public domain was no longer subject to tribal jurisdiction and had been detached from the Reservation.

In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), the Court recognized in dicta that the Act of March 2, 1889, 25 Stat. 896, which "restored to the public domain" a portion of the lands of the Great Sioux Reservation, terminated the Reservation as to those lands. 430 U.S. at 589 & n.5. Even Justice Marshall, who argued in a dissent that the Act at issue in Rosebud lacked an express indication of congressional intent to diminish, recognized that the language of the Act of March 2, 1889, disestablished the Reservation. He stated, "The very Act that created the Rosebud Reservation provides yet another example [of language effecting a diminishment], for in that Act Congress expressly 'restored to the public domain' part of

[12] Act of July 1, 1892, ch. 140, 27 Stat. 62, 63.



the Great Sioux Reservation. Act of Mar. 2, 1889, § 21, 25 Stat. 896." Id. at 618 (Marshall, J., dissenting).

In DeCoteau v. District County Court, 420 U.S. 425 (1975), the Court held that the Lake Traverse Reservation in South Dakota was diminished on the basis of cession-type language, but stated the issue to be whether the Reservation "was terminated and returned to the public domain by the Act of March 3, 1891, c.543, 26 Stat. 1035." In other words, land that was "returned to the public domain" was considered no longer subject to tribal jurisdiction. Indeed, the Court referred to the 1892 Act in Seymour, which, as noted above, disestablished the north half of the Colville Reservation by vacating and restoring it "to the public domain," and compared it with the 1906 Act in Seymour that merely "opened" the south half of the Reservation, but did not disestablish it, and concluded that the 1891 Act at issue was analogous to the 1892 Act in Seymour. 420 U.S. at 448-49.

The Supreme Court's latest discussion of "public domain" language is found in Solem v. Bartlett, 465 U.S. 463 (1984). The Court acknowledged that in the act at issue a reference to the opened areas as being in "the public domain" gave support to the argument for diminishment. The public domain language in Solem was located in an isolated section of the Act, was used only in a descriptive manner, and did not purport to restore any land to the public domain.[13] Because that phrase was

[13] The Act in question, the Cheyenne River Act, contained nine sections and spanned three and one-half pages in the statutes at large. Act of May 29, 1908, ch. 218, 35 Stat. 460-64. The operative language of the Act was found in the first sentence of the first section. 35 Stat.

not an operative provision of the Act, the Court concluded that it did not indicate congressional intent to diminish. Solem, 465 U.S. 474-75.

We have encountered only one case that stands contrary to these Supreme Court decisions on the effect of restoration language. Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986), held that neither the Uintah-Ouray Reservation nor the adjacent Uncompahgre Reservation had been disestablished or diminished. The majority addressed the effect of restoration language, however, only with respect to the Uncompahgre Reservation. The court, relying on a construction of Solem later rejected by a panel of the Tenth Circuit, concluded that "the phrase 'restore to the public domain' is not the same as a congressional state of mind to disestablish. In other words, it doesn't disturb the ownership of the land by the tribal group." 773 F.2d at 1092. In reaching this conclusion, the lead opinion wholly ignored the teachings of Seymour, Sioux Tribe, Rosebud, DeCoteau, and the authorities cited in Justice Marshall's dissent in Rosebud. With respect to the Uintah Reserva-

460; Solem, 464 U.S. at 472-73. The reference to "public domain" was found in the second proviso of the ninth section, or the last sentence of the Act. It was couched in the context of the Indians' right to use timber on particular sections of the lands to be opened:

> Provided, That Indians residing upon their allotments in townships sixteen north of ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one east shall have the right to use timber in said townships, except on sections sixteen and thirty-six for domestic purposes only as long as the lands remain part of the public domain.

35 Stat. 464. Unlike the instant case, this reference to public domain was clearly not the operative language of the Act.



tion, Ute Indian Tribe held that the terms of the 1905 Act alone governed the status of that Reservation and that the 1905 Act, which had no restoration language, did not diminish the Reservation. 773 F.2d at 1089; id. at 1093 (Seymour, J., concurring). The court stated that the 1902 and intervening Acts did not reveal a "'baseline purpose of disestablishment' that carried through into the 1905 Act." 773 F.2d at 1089.

After the decision in Ute Indian Tribe was rendered, a panel of the Tenth Circuit in Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1397-1404 (10th Cir.), cert. denied, 111 S. Ct. 581 (1990), revisited the issue of the legal meaning of the phrase "restore to the public domain" and held that when used as operative statutory language, the phrase extinguishes reservation boundaries as to that land restored to the public domain. We set out an extended portion of the court's analysis of the legal effect of restoration language, an analysis not undertaken in Ute Indian Tribe:

> [R]ecent Supreme Court cases assume in dicta that congressional restoration language extinguished boundaries. Mattz v. Arnett, 412 U.S. 481, 490, 93 S.Ct. 2245, 2250, 37 L.Ed.2d 92 (1973), cites language from the Indian Appropriations Act of July 27, 1868, ch. CCXLVIII, 15 Stat. 198, 223, (Congress restored Mendocino Reservation lands "to the public lands") as clear and sufficient language of extinguishment of reservation boundaries. Similarly, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 589, n.5, 600, 97 S.Ct. 1361, 1364 n.5, 1370, 51 L.Ed.2d 660 (1977), accepted restoration language in the Act of

March 2, 1889, ch. 405, § 21, 25 Stat. 888, 896 (portion of the Great Sioux Reservation "restored to the public domain") as language demonstrating congressional intent to extinguish prior boundaries. Even Justice Marshall's dissent in Rosebud acknowledges that section twenty-one of the Act of March 2, 1889 expressly disestablished part of the Great Sioux Reservation by restoring it to the public domain. Rosebud Sioux Tribe, 430 U.S. at 618, 97 S.Ct. at 1379 (Marshall, J., dissenting). Furthermore in Decoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), Justice White's majority opinion (holding that cession of Lake Traverse Indian Reservation lands disestablished the reservation boundaries) assumed that restoration language was the equivalent of extinguishment of reservation status for the lands affected. The Court stated: "That the lands ceded . . . were returned to the public domain, stripped of reservation status, can hardly be questioned . . . . The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.'" DeCoteau, 420 U.S. at 446, 95 S.Ct at 1094 (emphasis added).

Other Supreme Court cases suggest that affected Indian Tribes understood EO [executive order] restoration language to be language cancelling former EOs. In Sioux Tribe of Indians v. United States, 316 U.S. 317, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942), the Sioux sought compensation for the value of lands "restored to the public domain" but did not contest in that action, or any



other of which we are aware, the fact that whatever Tribal interest had been created by additions to the Great Sioux Reservation under EOs of 1875 and 1876 had been terminated by the restoration language of the subsequent EOs of 1879 and 1884. (The Court itself viewed such language as the equivalent of "cancelling or revoking" an EO establishing a Reservation or adding thereto. Sioux, 316 U.S. at 330, 62 S.Ct. at 1101.) See also Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 176, 67 S.Ct. 650, 653, 91 L.Ed. 823 (1947).

Evidence that lower courts have accepted the view that restoration language is synonymous with extinction of reservation status is found in Russ v. Wilkins, 410 F.Supp. 579 (N.D. Cal. 1976). "On many occasions Congress has unilaterally terminated sections of reservations by restoring them to the public domain. . . . The Act of 1873 [pertaining to the Round Valley Reservation in California] specifically 'restored to the public lands' the 12,000 acres it severed from the Reservation." Id. at 581. The court found that a subsequent 1905 act failing to employ restoration language did not terminate the reservation in question.

In summary, federal court cases reveal that neither Congress, the courts, nor Indian tribes themselves have insisted that restoration language be accompanied by more explicit cancellation language. Rather, they have used or accepted simple, operative restoration language as lan-

> guage of reservation termination in many situations. We have found no case where operative restoration language was not accepted as language of termination.

Yazzie, 909 F.2d at 1402-04 (footnotes omitted). In Yazzie, the court criticized the conclusion in Ute Indian Tribe that the phrase "restore to the public domain" is not the same as a congressional state of mind to disestablish, and characterized it as "unexamined and unsupported." Id. at 1400. Yazzie clearly departs from the court's prior conclusion in Ute Indian Tribe as to the effect of restoration language. Indeed, Yazzie held that the use of operative restoration language diminishes a reservation as to the land restored to the public domain.

Yazzie is consistent with a long line of lower federal court and state court decisions. See, e.g., Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 90 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977); United States ex rel. Condon v. Erickson, 478 F.2d 684, 687-88 (8th Cir. 1973); DeMarrias v. South Dakota, 319 F.2d 845, 846 (8th Cir. 1963); Russ v. Wilkins, 624 F.2d 914-15, 924, 927-29 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); United States v. Southern Pacific Transp. Co., 543 F.2d 676, 696 (9th Cir. 1976); see also United States ex rel. Cook v. Parkinson, 525 F.2d 120, 124 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); Putnam v. United States, 248 F.2d 292, 295 (8th Cir. 1957); Russ v. Wilkins, 410 F. Supp. 579, 581 (N.D. Cal. 1976), rev'd on other grounds, 624 F.2d 914 (9th Cir. 1980); United States ex rel. Condon v. Erickson, 344 F. Supp. 777, 778 (D.S.D. 1972), aff'd, 478 F.2d 684 (8th Cir. 1973); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp.



1001, 1005 (D. Minn. 1971); Lafferty v. State, 125 N.W.2d 171, 174 (S.D. 1963).

On the basis of the above, we conclude that operative statutory language that restores reservation land to the public domain is persuasive evidence of congressional intent to diminish the reservation as to the land so restored.

B. Whether the Unallotted Lands Were Restored to the Public Domain Pursuant to the 1902 and 1905 Acts of Congress

Provisions in four statutes, the Indian Appropriation Acts of 1902, 1903, 1904, and 1905, dealt with the opening of the Uintah-Ouray Reservation. The next issue is whether, as a matter of statutory construction, the provision in the 1902 Act which stated that unallotted reservation lands would be "restored to the public domain" remained in effect when the Reservation was finally opened by a presidential proclamation in 1905. That issue turns on the language of the Acts in question.

For the reasons that follow, we hold that as a matter of statutory construction, the 1905 Act was merely amendatory and supplementary to the 1902 Act and therefore did not accomplish the opening of the Reservation independent of the 1902 Act. By way of a brief overview, we note that the pertinent statutes, legislative history, and contemporaneous and subsequent congressional, executive, and judicial constructions of the 1902 and 1905 Acts all show that the 1902 Act was considered the basic statute dealing with the opening of the Reservation and that the

subsequent Acts did not repeal the 1902 Act's restoration language.

1. Establishment of the Uintah Reservation

The Indians who settled on the Uintah-Ouray Reservation consisted of several bands originally living in an area that included parts of what are now Colorado, Utah, and New Mexico. The Uintah Valley in eastern Utah was "set apart and reserved for the use and occupancy of Indian tribes" pursuant to an executive order issued by President Lincoln in 1861. I Kappler 900. In 1864, Congress authorized the Superintendent of Indian Affairs to bring together and settle in the Uintah Valley as many of the Indians living in the Utah Territory as practicable. Act of May 5, 1864, ch. 77, 13 Stat. 63. The Act set apart the Uintah Valley "for permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." Thus, the Reservation was neither created by treaty nor established for a specific tribe. Indeed, several different bands of Indians settled on the Reservation.

In 1888, the year after the enactment of the General Allotment Act, Congress, with the consent of the Indians, diminished the Uintah-Ouray Reservation by providing that approximately 7,000 acres, known as the Gilsonite Strip, were "to be public lands of the United States and restored to the public domain." Act of May 24, 1888, ch. 310, 25 Stat. 157. This Act concededly had the effect of diminishing the Reservation's boundaries. The United States District Court for the District of Utah so held in Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1099 (D. Utah 1981), and the Tribe did not appeal that ruling.



Congress first sought to open the Uintah Reservation to non-Indian settlement by the Indian Appropriations Act of 1894. Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-38. The 1894 Act directed a commission to negotiate with the Indians for the "relinquishment to the United States" of lands not needed for allotments.[14] No agreement, however, was forthcoming. In 1898, Congress provided for the "cession" of unallotted Indian lands on the Uintah-Ouray Reservation to the United States, subject to the consent of the Indians. Act of June 4, 1898, ch. 376, 30 Stat. 429. Again, because of Indian resistance, the purpose of this Act was not accomplished.

2. The Indian Appropriations Acts of 1902, 1903, 1904, and 1905

The Indian Appropriations Act of 1902 provided a comprehensive and detailed scheme for opening the Reservation. Act of May 27, 1902, ch. 888, 32 Stat. 245. In summary, the Act provided that (1) Indian consent was to be obtained; (2) allotments were to be made to the members of the Uintah and White River Tribes of Ute Indians, with 80 acres of irrigable, agricultural Reservation

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[14] The 1894 Act also began the opening process on the neighboring Uncompahgre Reservation. The Act provided for a commission to determine which lands on the Uncompahgre Reservation were unsuited or not required for allotments so that such lands could be "restored to the public domain and made subject to entry . . . ." Pursuant to the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87, Congress mandated the allotment and opening of the Uncompahgre Reservation. See Ute Indian Tribe, 521 F. Supp. at 1105-10. We do not address the issue of whether the Uncompahgre Reservation has been disestablished. The Tenth Circuit held that it was not. Ute Indian Tribe, 772 F.2d at 1090-93; id. at 1093-99 (Seymour, J., concurring).

land allotted to each "head of the family" and 40 acres of such land allotted to each "other member of said tribes;" (3) the allotments were to be made prior to October 1, 1903; (4) all unallotted lands were to be "restored to the public domain" on October 1, 1903; (5) land opened for public entry under the homestead laws would be sold for $1.25 per acre; (6) the proceeds from the "sale of the lands so restored to the public domain" would be used first to reimburse the United States for money advanced to the Indians to effectuate the provisions of the Act and then for the benefit of the Uintah and White River Ute Indians; and (7) persons or companies having then-existing mineral leases approved by the Secretary of the Interior or permits to negotiate with the Indians for mineral leases on the Reservation were to have a preferential right, in lieu of such a lease or permit, to locate 640 acres of contiguous mining land under the mining laws up to "thirty days before said lands are restored to the public domain." It is important to note that the date fixed by the 1902 Act for restoring the unallotted lands to the public domain was also the date for opening the unallotted lands to public entry and for completing the allotments of land to the Indians. Thus, the same date was critical to all three interrelated events.

The 1902 Act provided:

> That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall be caused to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty



> acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: Provided, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: And provided further, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians.

(Emphasis added.)

Less than a month after enactment of the 1902 Act, a Joint Resolution was passed on June 19, 1902, providing for the establishment of a tribal grazing reserve and for certain allotments of Uintah Reservation lands to be made to Uncompahgre Indians.[15] J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744, 745 (1902). The 1902 Joint Resolution affirmed the proposition that after the allotments were made to the Indians and the grazing reserve was established, the surplus lands were to be restored "to the public domain."[16]

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[15] Although the 1902 Joint Resolution provided for allotments on the Uintah Reservation to Uncompahgre Utes, the Uncompahgre Utes did not share in the proceeds from the opened lands.

[16] The 1902 Joint Resolution provided in part:

> In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.
>
> All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to each head of a family and forty acres to each other Indian, and no more. The grazing land selected and set apart, as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians



Prior to October 1, 1903, it became apparent that the surveying necessary to make the allotments to the Indians could not be completed and Indian consent would not be forthcoming. Accordingly, Congress enacted the Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-98. That Act specifically amended the 1902 Act in three respects: (1) It dispensed with the requirement that the Indians give their consent to the opening of the Reservation and the allotment program, although their consent was to be initially solicited; (2) it changed the October 1, 1903 date for "opening the unallotted lands to public entry on said Uintah Reservation as provided by the Act of May twenty-seventh nineteen hundred and two" to October 1, 1904; and (3) it provided that the grazing reserve established by the 1902 Joint Resolution should be limited to 250,000 acres and should be located on lands south of the Strawberry River.[17] The provision in the 1903 Act that the

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> receiving allotments in said reservation of the reduced area here named.
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> . . . .
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> The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

(Emphasis added.)

[17] The 1903 Act stated in pertinent part:

> To enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the purpose

allotments to the Indians and the opening of the Reservation would proceed even without Indian consent was apparently based on the United States Supreme Court's decision in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903),

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of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Walker River Reservation in Nevada, and the Uintah and White River Utes in Utah, and the joint resolution of June nineteenth, nineteen hundred and two, providing for the allotment of the Indians of Spokane Reservation in Washington, to be immediately available, one hundred and seventy-five thousand dollars: Provided, however, That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act: And provided further, That the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not exceed two hundred and fifty thousand acres: And provided further, That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May twenty-seventh, nineteen hundred and two, be, and the same is hereby, extended to October first, nineteen hundred and four.



decided January 5, 1903, which held that Congress could unilaterally diminish a reservation.[18]

The 1903 Act also appropriated additional funds to pay for the surveying necessary to make the allotments to the Indians under the terms of the 1902 Act. Although the 1903 Act did not itself contain restoration language, it was clearly understood that the restoration language of the 1902 Act remained in effect.

Pursuant to the statutory direction, Indian consent was solicited. The Bureau of Indian Affairs instructed Inspector James McLaughlin to meet with the Indians and explain the provisions of the 1902 and 1903 Acts and, if possible, obtain their consent to the congressional program for the allotment of lands to the Indians and the restoration of the surplus lands to the public domain. See Letter from Acting Commissioner of Indian Affairs to James McLaughlin, United States Indian Inspector, at 5 (April 29, 1903). Inspector McLaughlin met with the Indians in May 1903 and explained that the allotments would be made with or without their consent and that the Reservation would be diminished. Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Utah and White River Ute Indians at Uintah Agency, Utah, from May 18 to 23, 1903, at 34-35. He explicitly explained the congressional intent to diminish the Reservation:

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[18] In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587-88 (1977), the Supreme Court specifically relied on Lone Wolf in holding that the absence of Indian consent did not defeat congressional intent to diminish or disestablish a reservation. See also Solem v. Bartlett, 465 U.S. 463, 471 n.11 (1984).

> My friends, Red Cap said my talk was cloudy, and you do not understand it. You are the people who are in the dark in regard to the force of this act of congress, and I am trying to bring you into the light. You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but Congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation. Each of you will have a boundary to your individual holdings and there will also be a border to that 250,000 acre tract set apart for pasturage.

Id. at 42 (emphasis added).

The surveying necessary to make allotments to the Indians could not be completed by October 1, 1904, the date fixed in the 1903 Act for opening the Reservation. As a result, in 1904, Congress amended the 1902 and 1903 Acts and extended the time for making allotments and opening the unallotted lands to entry to March 10, 1905. Act of April 21, 1904, ch. 1402, 33 Stat. 189, 207-08. The 1904 Act also appropriated additional funds to complete the necessary surveying and to "otherwise carry out the purposes of so much of the act of May twenty-seventh, nineteen hundred and two . . . as provides for the allotment of the Indians of the Uintah and White River Utes in Utah."[19] All other terms of the 1902 Act, including

[19] The 1904 Act provided in its entirety:

> That the time for opening the unallotted lands to public entry on the Uintah Reservation, in Utah, as provided by the acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, be, and the same is hereby, extended to March tenth, nineteen hundred and five, and five thousand dollars is hereby appropriated to enable the Secretary of the Interior to do the necessary surveying, and otherwise carry out the purposes of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Uintah and White River Utes in Utah.



the language restoring the unallotted lands to the public domain, were left intact.

Once again, however, the time fixed for making allotments and opening the unallotted lands to public entry could not be met. In early 1905, a Senate Resolution directed the Secretary of the Interior to report on the progress that had been made in making the allotments to the Indians under the provisions of the 1902 Act. S. Res., 39 Cong. Rec. 1863 (1905). The Secretary of the Interior responded in a letter, explaining at some length the steps taken "to comply with the provisions of the Act of May 27, 1902" and why the delay in opening the Reservation had occurred. S. Doc. No. 159, 58th Cong., 3d Sess. 1, 2-4 (1905). Attached to the Secretary's letter was a report from the Commissioner of Indian Affairs stating that still more time was necessary to complete the allotment process. Id. at 21-22. Because of the delay, the time for completing the allotments and opening the Reservation had to be extended again.

On March 3, 1905, prior to the date fixed for opening the Reservation by the 1904 Act, Congress enacted the Indian Appropriations Act of 1905. Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70. The 1905 Act expressly amended the date fixed by the 1904 Act "for opening to public entry the unallotted lands on the Uintah Reservation" and established September 1, 1905, as the new date "for opening said reservation," but authorized the President to fix the opening at an earlier date.[20] The 1905

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[20] The pertinent part of the 1905 Act provided:

That so much of the act of March third, nineteen hundred and three, as provides that the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.

That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered



by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: Provided, That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: And provided further, That all lands opened to settlement and entry under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the act of Congress of May twenty-seventh, nineteen hundred and two, and the acts amendatory thereof and supplemental thereto.

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: Provided, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in

Act also repealed a portion of the 1903 Act that limited the location of the grazing reserve to the lands south of the Strawberry River. In addition, the Act added provisions authorizing the President to set apart Reservation lands for an addition to the Uintah Forest Reserve and for protecting the Indians' water supply or for general agricultural development.

Significantly, the language of the 1905 Act did not provide for the opening of the Uintah Reservation--that was done by the 1902 Act. Rather, the 1905 Act merely provided, "That the time for opening said reservation shall be extended to the first of September, nineteen hundred and five . . . ," and then specified only "the manner of opening . . . ." (Emphasis added.) The position of the Tenth Circuit in Ute Indian Tribe that the 1905 Act "opened" the Reservation simply is not, in our view, consistent with the language of the Act. On its face, the 1905 Act merely set a new date for when the opening was to occur and the manner of such opening. The operative statutory language which actually provided for the opening of the unallotted lands was found in the 1902 Act.

Clearly, nothing in the language of the 1905 Act indicates that Congress intended to repeal either the 1902 Act in total or the language of the 1902 Act restoring the unallotted lands to the public domain. Nor is there anything in the legislative history of the 1905 Act to that effect. On the contrary, in enacting the 1905 Act, Congress acted on the premise that the provisions of the 1902

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accordance with the provisions of the act opening the reservation.

(Emphasis added.)



and 1903 Acts and the 1902 Joint Resolution continued in effect. Indeed, with surgical precision, Congress expressly repealed a specific, but minor, part of the 1903 Act dealing with the location of the grazing reserve.

The language of the 1905 Act shows that Congress intended to amend the 1902 Act only by limiting "the manner of opening" the lands. The Act restricted initial entry on the opened lands to settlement under the homestead and town-site laws for a period of five years; after that, the lands were to be sold for cash in parcels not larger than 640 acres. The purpose of the amendment was to prevent the opened lands from falling into the hands of land speculators and to assure that the opened land would initially be used for agricultural purposes. See 39 Cong. Rec. 1185-86 (1905); Indian Appropriation Bill, 1906: Hearings before the Subcomm. of the Comm. on Indian Affairs of the Senate, 58th Cong., 3d Sess. 29-30 (1905).

The temporary limitation on the manner of entry under the homestead and town-site laws was patterned after the scheme used in the opening of the Rosebud Reservation. See 39 Cong. Rec. 1183 (1905). In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 608 (1977), the Court set out section 2 of the 1907 Act that was at issue there:

> Section 2 provides for the disposition of lands under the "general provisions of the homestead and town-site laws," while § 3 specifies land purchase prices, with the proviso that "any lands remaining unsold after the said lands have been opened to entry for seven years may be sold to

the highest bidder for cash, without regard to the above minimum limit of price."

The Court saw nothing inconsistent with the diminishment of the Rosebud Sioux Reservation and the provisions temporarily limiting entry into the opened lands. Id. at 609. Similarly, in DeCoteau v. District County Court, 420 U.S. 425, 442, 449 (1975), the Court held that an 1891 Act terminated the Lake Traverse Indian Reservation despite a provision in the Act opening lands "only to entry and settlement [at $2.50 per acre] under the homestead and townsite laws of the United States."

In sum, the language and legislative history of the 1905 Act show that Congress intended only to amend specific aspects of the 1902, 1903, and 1904 Acts and to provide additional authority to the President to set aside Reservation lands for specific uses. Except as specifically amended, Congress did not intend to change the basic features of the 1902 and 1903 Acts.[21] All language in the earlier Acts not specifically amended or repealed remained part of the statutory scheme dealing with the opening of the Reservation. Thus, after enactment of the 1905 Act, the 1902 Act remained in full force and effect with respect to (1) providing for allotments to heads of households and members of the Uintah and White River Tribes and for the amount of acreage for each allotment; (2) restoring the unallotted lands to the public domain; (3) fixing the price to be paid per acre by homesteaders; (4) providing how and to whose benefit the proceeds derived from the

[21] Unlike the 1902 and 1903 Acts, the 1904 Act added nothing substantive to the overall statutory scheme. It only extended the time for the opening.



sale of the unallotted lands were to be applied; and (5) protecting certain mineral rights. Of course, the provision in the 1902 Joint Resolution establishing the grazing reserve also remained in effect, although the 1905 Act repealed one minor aspect of the 1903 Act having to do with the location of the reserve.

We conclude that the 1902 Act established the basic statutory authority for opening the Uintah Reservation and that Congress intended thereby to diminish the Reservation. The congressional intent to diminish, as well as other essential aspects of the opening of the Reservation that were established by the 1902 Act, remained in full force and effect through the enactment of the 1902 Joint Resolution and the 1903, 1904, and 1905 Acts. The 1902 Act established more than a "baseline purpose" of restoring unallotted, unreserved lands to the public domain. See Rosebud, 430 U.S. at 592. The Act, on its face, provided for the opening of the Uintah Reservation. In short, the restoration language of the 1902 Act was operative statutory language when the opening finally occurred in 1905.

3. Contemporaneous and Subsequent Construction of the 1902 and 1905 Acts

The conclusion that the 1902 Act established the basic principles governing the opening of the Uintah Reservation is confirmed by subsequent presidential proclamations, congressional acts, executive department orders, and court decisions.

As stated earlier, the 1905 Act authorized the President to open the Reservation prior to September 1, 1905. The

actual opening of the Reservation was effectuated by the Presidential Proclamation of July 14, 1905, 34 Stat. 3119. The Proclamation expressly recognized the continuing operative effect of the 1902 Act and the public domain language therein, as well as the amendatory nature of the 1903, 1904, and 1905 Acts. The Proclamation stated that the time for opening the unallotted lands of the Uintah Reservation had been extended by the 1903, 1904, and 1905 Acts. More importantly, the Proclamation recognized the disestablishment of the Reservation as to the unallotted lands by quoting the language of the 1902 Act that the unallotted lands in the Uintah Reservation "'shall be restored to the public domain.'" The Proclamation also quoted the language in the 1902 Act that fixed the price to be paid for homesteaded land: "'persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre.'"[22] The Proclamation stated in pertinent part:

> Whereas it was provided by the Act of Congress, approved May 27, A. D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre."

[22] That the 1905 Act failed to fix a specific price to be paid for opened lands does not militate against diminishment. See Solem, 465 U.S. at 471; Rosebud, 430 U.S. at 596 n.18.



> And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069) . . . .
>
> . . . .
>
> Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States . . . .

Id. at 3119-20 (emphasis added).

By quoting the language from the 1902 Act that "restored" the unallotted land to "the public domain" and fixed the price to be paid per acre by homesteaders, the Proclamation demonstrates that the President deemed both provisions to be operative statutory positions govern-

ing the opened lands. The additional citation to the 1903, 1904, and 1905 Acts indicates that the President considered all four Acts relevant to the opening of the Reservation to public entry. The presidential conclusion that the 1902 Act restored the opened land "to the public domain" is an unambiguous and contemporaneous statement by the nation's Chief Executive as to how the 1902 and 1905 Acts should be construed and is therefore entitled to significant weight. See Rosebud, 430 U.S. at 602-03.

In addition, the Presidential Proclamation of September 1, 1906, 34 Stat. 3228, confirms the proposition that Congress intended that the unallotted lands be restored to the public domain and that the Reservation be diminished under the 1902 Act. The 1906 Proclamation dealt with a homestead entry that infringed on the Indian grazing reserve established by the 1902 Joint Resolution, as amended by the 1903 and 1905 Acts. The Proclamation adopted essentially the same construction of the operative Acts as the 1905 Proclamation. It implicitly recognized the diminishment of the boundaries of the Reservation by referring to the "former Uintah Indian Reservation in Utah" and by "restor[ing]" a small parcel of land from the grazing reserve "to the public domain" so as to make it subject to entry. The parcel had been erroneously located on a small part of the reserve and had been improved by the homesteader. Had the surplus reservation lands not been restored to the public domain by the 1902 Act, it would have been pointless to transfer the parcel from the grazing reserve to the public domain. The Proclamation stated:

> WHEREAS, the Secretary of the Interior, on July 11, 1905, under the authority of the act of June 19, 1902 (32 Stats., 744) amended by the act of March 3, 1903 (32 Stats., 982, 998) and March 3, 1905 (33 Stats., 1048, 1069), reserved certain lands in the former Uintah Indian Reservation in Utah, including Lots 2 and 13 in Sec. 10, T. 2 S., R. 1 E., containing 8.80 acres, for the Uintah Indian Grazing Reserve; and whereas, the President of the United States in his proclamation of July 14, 1905, opening the lands in the said Uintah Reservation to settlement and entry, excepted from such opening the lands included in said grazing reserve; and whereas one David Eskelson was, on September 26, 1905, erroneously allowed to include in his homestead entry No. 806, the said Lots 2 and 13, on which lots he has placed valuable improvements, and which, by virtue of their small area and being entirely segregated from the balance of the grazing reserve by the claims of the Raven Mining Company, are of no value as a part of said reserve:
>
> Now, therefore, I, THEODORE ROOSEVELT, President of the United States, by virtue of the power in me vested, do hereby declare and make known that the lots numbered 2 and 13 of Section 10, Township 2 S., of Range 1 E., Uintah Special Meridian, in Utah, are hereby restored to the public domain.

(Emphasis added.)

Congressional enactments after 1905 dealing with the Reservation were also based on the premise that the public domain language in the 1902 Act diminished the

Reservation's boundaries. In every instance of which we are aware, the 1903, 1904, and 1905 Acts were viewed as amendatory and supplementary to the 1902 Act and as consistent with the proposition that the opened lands had been restored to the public domain.

A 1906 Act extended the time for homesteaders to establish their residence on the opened lands. Act of January 27, 1906, 34 Stat. 9. The Act specifically referred to the unallotted Uintah Reservation lands as "heretofore a part of the Uinta Indian Reservation, within the counties of Uinta and Wasatch, in the State of Utah, opened under the Acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, and March third, nineteen hundred and five." (Emphasis added.) Similarly, in 1912, Congress provided an extension of time to make payment and proof of entry for "any person who has heretofore made a homestead entry for land which was formerly a part of the Uintah Indian Reservation in the State of Utah, authorized by the Act approved May twenty-seventh, nineteen hundred and two, and Acts amendatory thereto . . . ." Act of July 20, 1912, ch. 244, 37 Stat. 196-97 (emphasis added).

Both the 1906 and the 1912 Acts are similar to a 1905 Act discussed in Rosebud that extended the time for settlers to establish homesteads on former lands of the Rosebud Sioux Reservation. That Act referred to "'lands which were heretofore a part of the Rosebud Indian Reservation.'" Rosebud, 430 U.S. at 603 n.25 (emphasis in original). The Supreme Court characterized this statutory language as "additional evidence of the congressional intent to disestablish." The same conclusion applies here.



The Indian Appropriations Acts of 1910 and 1911 provide still further evidence of diminishment. The 1910 Act appropriated $5000 for the straightening of the Duchesne River "to be reimbursed to the United States out of the proceeds of the sale of lands within the ceded Uintah Indian Reservation opened to entry under the Act of May twenty-seventh, nineteen hundred and two." (Emphasis added.) Similarly, the 1911 Act provided $15,000 to build a bridge across the Duchesne River. Act of March 3, 1911, ch. 210, 36 Stat. 1073-74. The funds were to be reimbursed to the United States from the "sale of lands within the ceded Uintah Indian Reservation open to entry under the act of May twenty-seventh, nineteen hundred and two." (Emphasis added.) The term "ceded" in the 1910 and 1911 Acts may be technically misused, but in the context of the Acts, the term clearly refers to land that was detached from the Reservation by the 1902 Act. See Rosebud, 430 U.S. at 597-98.

The 1910 Act also appropriated funds to pay the Indians for land in the "former Uintah Indian Reservation" that was set apart by the President under the authority of the 1905 Act for reservoir and irrigation purposes in connection with the Strawberry River reclamation project.[23] Act of April 4, 1910, ch. 140, 36 Stat. 284-85. The funds that were to be paid the Indians for this land were to be provided by the owners of the lands irrigated by the project. The 1910 Act also provided, "All right, title, and

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[23] Pursuant to the authority of the 1905 Act, the President withdrew 56,000 acres for the Strawberry River reclamation project. Presidential Proclamation of August 3, 1905, 34 Stat. 3141. This withdrawal diminished the Reservation. See Ute Indian Tribe, 716 F.2d at 1314, rev'd on other grounds, 773 F.2d 1087.

interest of the Indians in the said lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project." 36 Stat. 285.

The use of extinguishment language in the 1910 Act does not support a conclusion that Congress would have used this type of explicit language of diminishment in the 1902 Act if Congress had intended to diminish the Reservation. The lands that were detached from Indian ownership and jurisdiction under the 1910 Act passed directly from the Reservation as it existed after 1905 to a specific type of private use and did not ever become part of the public domain. Indeed, because of the specified use to which the detached lands were put, it would have been inappropriate to restore those lands to the public domain. For that reason, the more explicit diminishment language in the 1910 Act was necessary.

Statements of executive department officials and congressional committees have also consistently concluded that the opened lands were restored to the public domain by the 1902 Act. In 1911, E. P. Holcombe and James M. McLaughlin filed a report with the Department of the Interior concerning the Uintah Reservation. The report stated that on July 14, 1905, "the President issued a proclamation opening the lands to entry August 28, 1905, . . . and there were restored to the public domain to be disposed for the benefit of the Indians about 1,004,005 acres."[24] H.R. Doc. No. 892, 62d Cong., 2d Sess. 1-2

[24] We note that this acreage figure is difficult to reconcile with other figures in this opinion dealing with the amount of land restored to the public domain, see supra at 8-9 & n.10, and appears inaccurate.



(1912). A 1941 report of the Senate Committee on Indian Affairs, issued before the 1945 Order of Restoration, discussed infra, and before the addition of the Hill Creek Extension, stated:

> The Uintah and Ouray Indian Reservation was established in 1861 for the Uintah, Uncompahgre, and White River Bands of Ute Indians. The original area of the reservation was approximately 2,039,040 acres. Cessions were made to the United States at various times so that at present the reservation embraces but 366,000 acres or less than one-fifth of the original.

S. Rep. No. 243, 77th Cong., 1st Sess. 3 (1941); see also, H.R. Rep. No. 2047, 69th Cong., 2d Sess. 2 (1927); H.R. Rep. No. 2503, 82d Cong., 2d Sess. 2, 3 (1952).

Official action of the Secretary of the Interior also provides persuasive evidence of executive department recognition of diminishment. In 1934, Congress authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States . . . ." Act of June 18, 1934, ch. 576, 48 Stat. 984. In 1945, the Secretary of the Interior issued an "Order of Restoration" pursuant to the 1934 Act that restored to the Uintah Reservation 217,000 acres of the undisposed, opened lands that remained in the public domain. That Order restored both the ownership of those lands to the Tribe and, by making the lands part of the

Reservation, the tribal jurisdiction over them. The Order stated:

> Whereas, pursuant to the provisions of the act of May 27, 1902 (32 Stat., 263), as amended, the unallotted lands of the Uintah and Ouray Indian Reservation in the State of Utah, were made subject to disposal under the laws of the United States applying to public lands, and
>
> Whereas, there are now remaining undisposed of within said area approximately 217,000 acres of unallotted lands, which need closer administrative control in the interest of better conservation practices, and
>
> Whereas, by relinquishment and cancellation of homestead entries within this area a limited additional acreage of land of similar character may later be included within this class of undisposed-of opened land, and
>
> Whereas, the Tribal Council, the Superintendant of the Uintah and Ouray Agency, and the Commissioner of Indian Affairs have recommended restoration to tribal ownership of such undisposed-of surplus unallotted lands in the said reservation,
>
> Now, therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the act of June 18, 1934 (48 Stat. 984), I hereby find that the restoration to tribal ownership of all lands which are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ouray Reservation will be in the public interest, and the said lands are hereby restored to tribal ownership for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah, and are added to and made a part of the existing reservation, subject to any valid existing rights.

Order Notice, 10 Fed. Reg. 12,409 (1945) (emphasis added).

The law is clear that if mere legal title to opened surplus lands passed to non-Indians, such lands remained part of the reservation, and restoring the opened lands to tribal ownership would have no effect on their status as reservation lands, since by definition they never left the reservation. But if tribal boundaries were diminished when the surplus lands were opened, the return of those lands to the reservation would enlarge the boundaries of the reservation. See Solem, 465 U.S. at 467-68. Thus, in restoring both the ownership of and the jurisdiction over the lands to the Tribe, the 1945 Order of Restoration was premised squarely on the proposition that the 1902 Act disestablished the Reservation as to the opened lands.

More recent evidence that the restoration language of the 1902 Act was operative at the time of the opening is found in a 1971 order of the Secretary of the Interior revoking a 1930 withdrawal of oil shale lands because the initial withdrawal had clouded title to part of the Uintah Reservation grazing and timber reserve, the allotted lands, and the lands restored to the public domain by the 1902 Act and later restored to the Reservation under the 1945

Order of Restoration. Order Notice, 36 Fed. Reg. 19,920 (1972). The 1971 Order recited the legal history of the Reservation, including the restoration of the "unallotted lands of the Uintah and Ouray Indian Reservation . . . to the public domain." Part of the Order stated:

> Whereas, pursuant to the provisions of the Act of May 27, 1902 (32 Stat. 263), as amended and supplemented by the Acts of March 3, 1903 (32 Stat. 998); April 21, 1904 (33 Stat. 207); March 3, 1905 (33 Stat. 1069); and May 14, 1920 (41 Stat. 599); most of the unallotted lands of the Uintah and Ouray Indian Reservation in Utah were restored to the public domain with the proceeds from the sale of said lands to be used for the benefit of the Indians . . . .

In addition, both the Department of Justice and the Ute Tribe have formally stipulated that the unallotted, opened lands were restored to the public domain by the 1902 Act. In its amicus brief filed in connection with the petition for a writ of certiorari in Ute Indian Tribe, the Department noted that both it and the Uintah and White River Bands of Ute Indians had stipulated that the Indians on the Uintah-Ouray Reservation "'received individual allotments thereon pursuant to the Act of May 27, 1902, as amended,' and that surplus lands were 'restored to the public domain' pursuant to the 1902 Act 'and amendments thereto.'"[25] The stipulation was filed with the Court of Claims

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[25] Brief of the United States in opposition as Amicus Curiae, Utah v. Ute Indian Tribe, on petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit, No. 85-1821, October Term 1986, at 13 n.7, cert. denied, 479 U.S. 994 (1986). The



in conjunction with the litigation in Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1 (1957).

The Ute Tribe has also acknowledged that the Reservation had been diminished. The Tenth Circuit's panel opinion in Ute Indian Tribe stated:

> [T]he 1957 Ute Ten Year Development Program provides a description of the total acreage of the Uintah and Ouray reservation as currently containing 1,010,000 acres. In detail, it delineates, "The original area of the Uintah Reservation in Wasatch, Duchesne and Uintah Counties [was] reduced as follows. . . ." (The document then details the Gilsonite Strip reduction, the 1905 addition to the Uintah Forest Reserve, the Strawberry River reduction, the 1902 grazing reserve and allotments to individual Indians and "[a]pproximately 798,877 acres were disposed of by the United States for cash, or otherwise set aside and taken for its own use at various times since the opening of the reservation in 1905.").

Ute Indian Tribe v. Utah, 716 F.2d 1298, 1313 (10th Cir. 1983), vacated, 773 F.2d 1087 (10th Cir. 1985) (en banc).

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Department of Justice stated in its amicus brief, "The quoted passages do not suggest that the 1902 Act was the sole basis for allotment and opening; to the contrary, they make clear that the substantive provisions of the 1902 Act were 'amended.'" That point, however, has never been contested. What is significant is that the Department formally acknowledged in court that the surplus lands had been restored to the public domain pursuant to the 1902 Act and the amendments thereto.

As recently as 1977, the Forest Service took the position that the Ashley and Uintah National Forests and the High Uintah Wilderness were not part of the Reservation because "the original Uintah Reservation boundaries were disestablished and present Reservation boundaries include only the trust lands."[26] Moreover, Department of Interior officials have consistently viewed only the trust lands (the tribal grazing reserve, allotments, and land later restored to tribal ownership and reservation status) as the lands that lie within the Reservation.[27]

Finally, a number of court decisions have also stated or held that the language in the 1902 Act restoring the unallotted lands to the public domain was operative when the Reservation was opened in 1905 and that the 1905 Act simply extended the time for opening the unallotted, unreserved lands to public entry. In Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910), the issue was whether an

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[26] Brief of Duchesne and Uintah Counties as Amici Curiae, at 16 (quoting Letter from United States Forest Service to Scott M. Matheson, Governor of Utah (April 8, 1977)).

[27] H.R. Rep. No. 5010, 59th Cong., 1st Sess. 1-2 (1906); Letter from C. F. Darrabee, Acting Commissioner of Office of Indian Affairs to H. C. Means, Superintendent of Irrigation Survey, Whiterocks, Utah 1-2 (September 26, 1907); Letter from First Assistant Secretary of Department of the Interior to Commissioner of Indian Affairs (November 8, 1907); Letter from Secretary of the Department of the Interior to Secretary of the Treasury (December 19, 1908); 1929 Annual Report of Uintah and Ouray Agency, Fort Duchesne, Utah 1; 1931 Annual Report of Uintah and Ouray Agency, Fort Duchesne, Utah 4-6; 1932 Annual Report of Uintah and Ouray Agency, Fort Duchesne, Utah 1-2; Bureau of Indian Affairs, Phoenix Area Office, Information Profiles of Indian Reservations in Arizona, Nevada, & Utah 155 (1976).



application was properly made to the Utah State Engineer for an award of water rights to be used on land that was opened to public entry in 1905. This Court reviewed the statutes dealing with the opening of the Reservation, beginning with the 1902 Act, and stated:

> It may be judicially noticed, and here stated, that Congress in 1902 ordered the unallotted lands of the Indian reservation referred to in the complaint to be restored to the public domain on the 1st day of August, 1903. That time was extended to October 1, 1904, and again to March 10, 1905. On March 3, 1905, Congress again extended such time to September 1, 1905, but authorized the President of the United States by proclamation to fix an earlier time. Thereupon, the President, on the 14th day of July, 1905, issued a proclamation restoring the unallotted lands of the reservation to the public domain, and declaring such lands open to entry, settlement, and disposition on and after the 28th day of August, 1905.

108 P. at 1114. Although it cannot be said, as a technical matter, that the Sowards opinion specifically addressed the question of whether the Reservation was disestablished as to the lands that were returned to the public domain, it is clear that this Court held that the 1905 Act amended the 1902 Act and that the 1902 Act restored the open, unallotted lands to the public domain. See also White Rocks Irrigation Co. v. Mooseman, 45 Utah 79, 141 P. 459, 460 (1914).

The Court of Claims' opinion in Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl.

1 (1957), reached the same conclusion. That case awarded compensation to the Uintah and White River Utes for the withdrawal by the United States of the lands that were set apart and added to the Uintah Forest Reserve pursuant to the 1905 Act. In the course of the opinion, the court stated that after the allotments to the Indians were made, the surplus lands were opened to public entry and the proceeds from these lands totalling $1,184,996.33were credited to the account of the Uintah and White River Utes. Id. at 22. With respect to the 1902 Act, the court stated that "surplus lands (with the exception of forest reserve and reclamation withdrawals and certain mineral entries) were restored to the public domain, and opened for disposition under the public land laws for the benefit of the Indians." Id.

The same construction was placed on the 1902 and 1905 Acts by the Court of Appeals for the Tenth Circuit in Hansen v. United States, 153 F.2d 162 (10th Cir. 1946). Hansen held that the 1902 Act restored the unallotted lands "to the public domain" and that the 1903, 1904, and 1905 Acts "extended the time for opening the unallotted lands to the public domain." Id. at 163. This opinion was handed down just a few months after the 1945 Order of Restoration by the Secretary of the Interior and apparently without knowledge of it, for the Court noted, "Approximately 220,000 acres of the lands restored to the public domain by the Act of May 27, 1902, remain undisposed of." Id.

In United States v. Boss, 160 Fed. 132 (D. Utah 1906), the United States District Court for the District of Utah dismissed an indictment which charged that the defendant knowingly introduced intoxicating liquor into Indian



country in violation of federal law. The crime had occurred after the opening of the Uintah Reservation in 1905 on unallotted land that had been reserved by the Secretary of the Interior for school and Uintah Agency purposes. The court traced the legislative history of the Uintah Reservation, including the interdependence of the 1902 and 1905 Acts, and found Ex parte Dick, 141 Fed. 5 (9th Cir. 1905), rev'd on other grounds, 202 U.S. 132 (1906), dispositive. In Dick, the Ninth Circuit vacated the federal conviction of a defendant for knowingly introducing intoxicating liquor into Indian country because the crime had occurred on land over which the state had exclusive jurisdiction. The sale of liquor in Dick occurred on Nez Perce Reservation land that had been ceded to the United States by a congressional act and sold to a municipal corporation. The court concluded, "In the present case, the sale of liquor was made in a municipal territory clearly within the jurisdiction of the state, and outside the jurisdiction of the United States." Dick, 141 Fed. at 8. Thus, Boss's dismissal of the indictment for lack of federal jurisdiction and its reliance on Dick implicitly acknowledged that the unallotted lands of the Uintah Reservation had been restored to the public domain and were therefore subject to the state's exclusive jurisdiction. See also United States v. Fitzgerald, 201 Fed. 295, 296 (8th Cir. 1912) (referring to "the former Uintah Indian Reservation").

In sum, Congress, the President, executive department agencies, including the Department of Justice, the Department of the Interior, the Bureau of Indian Affairs, and the Forest Service, the courts, and the Ute Tribe itself have acted on the premise that the restoration language in the 1902 Act restored the unallotted, surplus land in the

Uintah-Ouray Indian Reservation to the public domain when the Reservation was finally opened in 1905 and diminished the Reservation as to that land.

## III. CONCLUSION

The 1902, 1903, 1904, and 1905 Acts, carefully analyzed, require the conclusion that the restoration language in the 1902 Act continued in operative effect as part of the scheme for opening the Reservation and that the 1905 Act simply amended and supplemented the 1902 Act. The 1905 Act did not restate the proposition that the unallotted, unreserved lands were restored to the public domain. Nor did it restate several other legal principles established in the 1902 Act that also governed the opening of the Reservation. As an act that amended and supplemented the 1902 Act, there was no need for the 1905 Act to restate that which was already established. Simply stated, the 1905 Act did not stand alone in opening the Reservation; it only extended the time for opening the Reservation under the 1902 Act and provided for the manner of the opening. The fact that the 1905 Act allowed settlement on the opened lands only under the homestead and town-site acts for a period of five years does not compel a different conclusion, nor does the fact that the Uintah and White River Utes were not paid a sum certain for the opened lands. Because the restoration language in the 1902 Act was never repealed, it remained in effect, and the Reservation was diminished. This case cannot therefore be disposed of under the rulings in Rosebud, Mattz, and Seymour that surplus land acts that simply "open" reservation lands to entry by non-Indians do not diminish the reservation.



In conclusion, we hold that the unallotted, unreserved lands of the Uintah Reservation were restored to the public domain by the 1902 Act, as amended by the 1903, 1904, and 1905 Acts, and that the Reservation boundaries were diminished by that restoration. The Reservation boundaries were further diminished by the withdrawal for the Strawberry River reclamation project and later enlarged by the 1945 Order of Restoration and the 1948 Hill Creek Extension.[28] Since Myton, Utah, lies outside

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[28] We do not address the issue of whether the 1905 addition to the Uintah National Forest diminished the Reservation. The Tenth Circuit en banc decision in Ute Indian Tribe held that it was not thereby diminished, 773 F.2d at 1089-90; id. at 1099-1101 (Seymour, J., concurring), whereas that court's panel decision and the decision of the United States District Court for the District of Utah held otherwise. 716 F.2d at 1313-14; 521 F. Supp. at 1136-37. It is significant to note that the 1905 Act, which granted the President the authority to reserve unallotted lands in the Reservation as an addition to the Uintah Forest Reserve, specifically provided that such lands would be "subject to the laws, rules, and regulations governing forest reserves . . . ." 33 Stat. 1070. The full text of the statute is set out at n.20 supra. It was pursuant to this statutory authority that President Roosevelt withdrew 1,010,000 acres from the Uintah Reservation for the national forest by the Proclamation of July 14, 1905, 34 Stat. 3116. The administrative authority over these lands was transferred from the Secretary of the Interior and the Bureau of Indian Affairs to the Secretary of Agriculture pursuant to the Act of February 1, 1905, ch. 288, 33 Stat. 628, and subjected to the jurisdiction of the Forest Service. In his dissenting opinion in Ute Indian Tribe, 773 F.2d at 1115, Judge Seth stated that Congress clearly evidenced an intent to remove the lands from the Reservation by the transfer of reservation status and administrative authority. See also United States v. Gimmell, 535 F.2d 1145, 1149 (9th Cir. 1976) (continuous use of forest land for conservation and recreation strongly suggests extinguishment of Indians' title). The Utes were paid $1,217,000 in compensation for the forest reserve lands. See Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1, 7, 27-29 (1957).

the boundaries of the Reservation so described, it is not within Indian country. Therefore, the district court had subject matter jurisdiction over the burglary and the prosecution of Clinton Perank.

Affirmed.

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WE CONCUR:

_____
Gordon R. Hall, Chief Justice

_____
Richard C. Howe, Associate
Chief Justice

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Christine M. Durham, Justice

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ZIMMERMAN, Justice: (Dissenting)

I dissent. I cannot join the majority in interpreting a federal statute that affects the boundaries of the Uintah-Ouray Indian Reservation in a way which contradicts the construction approved by a majority of the entire United States Court of Appeals for the Tenth Circuit. I find almost incredible the refusal of the majority of this court



to accord comity to a federal court's decision in an area in which the federal government has preeminent authority and a unique trust responsibility. A majority of this court has given the State of Utah what it has desperately sought for six years--a second shot at persuading the United States Supreme Court to reject the Tenth Circuit's ruling and to give Utah control over a large part of the original reservation. This litigation certainly will not end here, now that there is a square conflict between the entire Tenth Circuit and this court. But this tactical victory for the State comes at an unacceptably high cost to the relationship between the state and federal judiciaries. Moreover, on the merits, I think the majority reaches the wrong result.

This case arises in the context of Clinton Perank's appeal challenging Utah's assertion of criminal jurisdiction over him. The State has taken advantage of Perank's appeal from a relatively minor criminal conviction to relitigate the question of the Uintah-Ouray Indian Reservation boundaries. In a separate federal proceeding seven years ago, the Tenth Circuit decided these boundaries against the State. Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). Now, the State seeks to reopen the boundary issue in a new forum.

I would object to the State's opportunistic misuse of Perank's petty criminal prosecution to readjudicate a settled issue under any circumstance, but the unequal and inadequate briefing of the boundary issue in this case makes it a particularly poor vehicle for bringing us into a direct confrontation with the Tenth Circuit. Perank's brief contained a total of six pages of argument, the bulk of it

concerning his assertion that he is an Indian. He allotted fewer than two pages to jurisdictional and boundary issues. In contrast, the State filed a fifty-page brief, devoting the majority of it to an attack on the Tenth Circuit's decision in Ute Indian Tribe and to a reargument of the boundary issue. In addition to the disparate treatment of the boundary issue by the immediate parties, Uintah and Duchesne Counties, which were also parties to the Tenth Circuit action, lodged a seventeen-page amicus brief supporting the State's position. Recognizing the one-sidedness of the proceeding, the State's counsel acknowledged at oral argument that perhaps the State's real adversary in this case--the Tenth Circuit--was absent.

We made an attempt to cure the one-sidedness of the briefing by soliciting participation by other parties with interests in this case. Unfortunately, we met with little success. At our invitation, the Ute Indian Tribe filed an amicus brief. However, apparently believing that we would not consider overturning the result of the Tenth Circuit's en banc decision, the Tribe, rather than addressing the impact of the Tenth Circuit's decision on our consideration of the issue or the merits of the boundary dispute, argued only that Perank was not a member of the Tribe and was therefore not in a position to challenge the state court's jurisdiction over him.

The week before argument, we contacted the State and encouraged it to inform the United States Attorney of the upcoming argument and to inquire whether the Justice Department wished to present its position before this court. The Justice Department did not appear at argument. We then invited the Justice Department to brief its position as an amicus. However, the Justice Department,



demonstrating a surprising lack of interest in the case, refused to brief the matter and submitted only the brief it had filed years earlier in opposition to the State's petition for a writ of certiorari to the Tenth Circuit in Ute Indian Tribe. Thus, the State's arguments on the boundary question were virtually unchallenged.

Notwithstanding the lack of a true adversary proceeding on the boundary issue, the majority eagerly proceeds to the merits of the boundary dispute and takes a position contrary to that of a majority of the entire Tenth Circuit. I would find a direct confrontation with the Tenth Circuit on an essentially federal issue something to be avoided under any circumstances, but this court's rush to adjudicate the issue is especially egregious given the importance of this question and the fact that the interests of all parties affected in the proceeding are not fairly before this court.

The reason I would not reach the merits of the boundary issue can be summed up in one word: comity. Under the doctrine of comity, courts of one jurisdiction will give effect to the laws and judicial decisions of another out of deference and mutual respect. See, e.g., Pan Energy v. Martin, 813 P.2d 1142, 1146 (Utah 1991); Tracy v. Superior Court, 810 P.2d 1030, 1041 (Ariz. 1991); Perrenoud v. Perrenoud, 480 P.2d 749, 760 (Kan. 1971); In re Custody of Sengstock, 477 N.W.2d 310, 314 (Wis. Ct. App. 1991). See generally 21 C.J.S. Courts § 210 (1990). The scope and applicability of the comity doctrine are committed to the sound discretion of each court. See, e.g., Pan Energy, 813 P.2d at 1146; State ex rel. Speer v. Haynes, 392 So. 2d 1183, 1185 (Ala. Civ. Ct. App. 1979), rev'd on other grounds sub nom. Ex Parte Haynes, 392 So. 2d 1187 (Ala. 1988); Tracy, 810 P.2d at 1041; Philadelphia v. Austin, 429

A.2d 568, 572 (N.J. 1981); Sheridan v. Sheridan, 223 N.W.2d 557, 560 (Wis. 1975). The instant case presents compelling reasons to follow the rules of comity and defer to the Tenth Circuit's resolution of the boundary issue.

As a general proposition, we should defer to decisions of coordinate courts that have resolved the precise issue we face, unless doing so would contravene the laws or policy of this state. See, e.g., Philadelphia, 429 A.2d at 572; In re Custody of Sengstock, 477 N.W.2d at 314. Although we have an interest in determining the scope of our own jurisdiction, I know of no existing state law or policy that would preclude us from deferring to the Tenth Circuit's determination of the boundaries of the Uintah-Ouray Indian Reservation.[1] For example, if we were to defer to the Tenth Circuit's decision, the result would not leave a jurisdictional void resulting in wrongs to this state or its citizens that would go uncompensated or unpunished. The Ute Indian Law and Order Code provides the courts of the Ute Indian Tribe with jurisdiction over civil and criminal matters occurring on the reservation and

[1] In footnote two of the court's opinion, the majority states that the Justice Department "failed to recognize that the Tenth Circuit's en banc decision in Ute Indian Tribe was in conflict with prior decisions of this [c]ourt." The majority then cites Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910), and White Rocks Irrigation Co. v. Mooseman, 45 Utah 79, 141 P. 459 (1914). Yet as the majority itself recognizes, "it cannot be said, as a technical matter, that the Sowards opinion specifically addressed the question of whether the Reservation was disestablished as to the lands that were returned to the public domain." The same observation holds true for White Rocks Irrigation Co. Consequently, the implication of the majority opinion in footnote two--that this court has previously ruled on the issue at bar and that the majority opinion is, in part, following established precedent--is simply incorrect.



recognizes the jurisdiction of other forums where the Tribe does not have jurisdiction. See The Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah § 1-2-5. And we have spoken before of the need to recognize Indian tribes as sovereigns that are entitled to a presumption of legitimacy insofar as the exercise of their judicial power is concerned. See In re Adoption of Holloway, 732 P.2d 962, 968 (Utah 1986); cf. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48-49 (1989) (approving Holloway).

But even if there were some presumption that we should reexamine a federal court determination of the jurisdiction of Utah courts--a proposition neither the State nor the majority advances--the circumstances of this case are more than sufficient to show that such a redetermination is inappropriate. First, comity concerns are heightened here where we are asked to revisit issues of federal law, decided on defensible bases by coordinate federal courts,[2] for the sole purpose of creating a conflict with the federal courts to force Supreme Court review. "Comity between federal and state courts is necessary to prevent scandal from unseemly conflicts of jurisdiction and

[2] See, e.g., Hall v. Nomura Securities Int'l, 268 Cal. Rptr. 45, 49 (Ct. App.), reh'g denied (June 20, 1990); Bouwman v. Department of Social Servs., 375 N.W.2d 806, 808 (Mich. Ct. App. 1985); Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1244 (N.J. 1990); Van De Hey v. United States Nat'l Bank of Oregon, 793 P.2d 1388, 1390 (Or. Ct. App. 1990), aff'd, 313 Or. 86, __ P.2d ___ (1992); State v. Goodell, 734 P.2d 10, 11-12 (Or. Ct. App.), rev. denied, 737 P.2d 1248 (Or. 1987). See generally Note, Authority in State Courts of Lower Federal Court Decisions on National Law, 48 Colum. L. Rev. 943 (1948); Annotation, Duty of State Courts to Follow Decisions of Federal Courts, Other Than the Supreme Court, on Federal Questions, 147 A.L.R. 857 (1943).

to promote a decent and orderly administration of justice." 21 C.J.S. Courts § 210 (1990). Instead of seeking to further the interests of comity--prevention of a direct jurisdictional clash and promotion of the uniform administration of justice--the majority's decision to reach and redecide the merits of the boundary question needlessly upsets a previously settled area of law and achieves the opposite effect. Today's decision encourages litigants to forum shop in the hope of inconsistent decisions, an ill comity seeks to avoid in the federal-state context.[3] See Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1244 (N.J. 1990)

An additional reason for applying principles of comity is to recognize the unique role of federal law in regulating Indian lands and interests. Because of this unique role, "federal courts are the ultimate decision maker as to whether federal, state or tribal courts have jurisdiction in a particular Indian law case." State v. Daly, 454 N.W.2d 342, 344 (S.D. 1990). The primacy of federal authority in this area stems from at least three sources: the Constitution, the federal statute that admitted Utah to the Union, and the special relationship assumed by the federal government toward Indian tribes.

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[3] The application of comity principles in the federal-state context is not new to this state. On at least one occasion of which I am aware, this court has recognized the appropriateness of deferring to federal court interpretations of federal law. See Kuchenmeister v. Los Angeles & S.L.R.R., 52 Utah 116, 122, 172 P. 725, 727 (1918); cf. Antillon v. Department of Employment Sec., 688 P.2d 455, 457 (Utah 1984) (holding that state court must follow federal court decision construing analogous statute from another state where statutes were enacted as condition of continued federal approval of state unemployment compensation programs).



The Constitution makes the federal government supreme in dealings with Indian tribes. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832). Section 8 of Article I gives the federal government power "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes."[4] U.S. Const. art. I, § 8, cl. 3. This provision implicitly recognizes that Indian tribes are quasi-sovereign entities with sui generis status as "domestic dependent nations" under federal law. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831). As an aspect of their inherent sovereignty, tribes exercise powers of self-government. United States v. Wheeler, 435 U.S. 313, 322-23 (1978). In line with this grant of authority to the national government, state interference in the government-to-government relationship existing between the United States and Indian tribes is generally prohibited except to the extent that Congress has granted the state such authority. See Worcester, 31 U.S. (6 Pet.) at 561-62; Felix S. Cohen, Handbook of Federal Indian Law 259 (1982) [hereinafter Cohen].[5] This "'policy of leaving

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[4] The Treaty Clause, U.S. Const. art. II, § 2, and the Supremacy Clause, id. art. VI, cl. 2, are also often cited as sources of exclusive federal power in dealing with Indian tribes. See Felix S. Cohen, Handbook of Federal Indian Law 207-12 (1982).

[5] I recognize that the United States Supreme Court's "more recent cases have recognized the rights of states, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands . . . ." County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, ___ U.S. ___, ___, 112 S. Ct. 683, ___, 116 L. Ed. 2d 687, 697 (1992). However, absent congressional authorization, such state jurisdiction is clearly prohibited to the extent that it "'would interfere with reservation self-government or impair a right granted or reserved [to the tribe] by federal law.'" Id. (quoting Organized Village of Kake v. Egan, 369 U.S.

Indians free from state jurisdiction and control is deeply rooted in the Nation's history.'" McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168 (1973) (quoting Rice v. Olsen, 324 U.S. 786, 789 (1945)). Recognition of this policy was a condition of Utah's admission to the Union. The Enabling Act states:

> [T]he people inhabiting said proposed State do agree that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .

Enabling Act, Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107. I recognize that we have concurrent authority with federal courts to construe federal statutes. However, the constitutional commitment of authority over Indian tribes to the federal government requires that we proceed with special care in cases affecting the tribes. And when a federal court has spoken directly on an issue of Indian law, this care should be transformed to an extreme reluctance to redecide the matter.

The federal government's trust responsibility to Indian tribes also bears on the question of whether we should honor comity principles in this case. Ever since Chief Justice Marshall described the relationship of the tribes to

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60, 75 (1962)).



the United States as "that of a ward to his guardian," Cherokee Nation, 30 U.S. (1 Pet.) at 16, the trust relationship has been a cornerstone of federal Indian jurisprudence. Cohen at 221. Of similar importance is the well-recognized federal policy of supporting tribal self-government and self-determination. See National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985); Cohen at 349. The federal government's trust responsibility to the tribes and the federal policy supporting tribal self-government and self-determination provide a backdrop against which federal courts resolve Indian issues. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). And it is this perspective that underlies the rule that courts are to interpret statutory provisions affecting Indians in favor of the tribes. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Ute Indian Tribe, 773 F.2d at 1089.[6]

Based on the foregoing considerations, I conclude that comity principles require deference to the Tenth Circuit's disposition of the boundary issue.

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[6] See also National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) (holding that policy of supporting tribal self-government and self-determination favors rule that provides tribal courts the first opportunity to evaluate factual and legal bases for jurisdictional challenges); Nance v. Environmental Protection Agency, 645 F.2d 701, 710-11 (9th Cir.) (noting that "any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes" (emphasis in original)), cert. denied sub nom. Crow Tribe of Indians v. Environmental Protection Agency, 454 U.S. 1081 (1981).

Following the course I suggest would not be novel. Several state courts have relied on comity principles in deferring to federal court decisions on Indian law questions. See, e.g., Daly, 454 N.W.2d at 344; State v. Francis, 563 A.2d 249, 253 (Vt. 1989). Indeed, the South Dakota Supreme Court has gone so far as to overrule one of its cases in recognition of a federal court of appeals' ruling concerning South Dakota's jurisdiction over Indians living within the state. State v. Spotted Horse, 462 N.W.2d 463, 467 (S.D. 1990), cert. denied, ___ U.S. ____, 111 S. Ct. 2041, 114 L. Ed. 2d 125 (1991). Similarly, the Oregon Court of Appeals has overruled one of its prior decisions in order to defer to a federal court of appeals' ruling regarding a tribe's treaty right to fish. State v. Goodell, 734 P.2d 10, 11-12 (Or. Ct. App.), rev. denied, 737 P.2d 1248 (Or. 1987). Although these two courts did not expressly rely on comity principles in their holdings, I see no other obvious bases for the results they reached.

In short, there is well-established precedent for following comity principles in cases such as this.

As a final matter, I register my objection to the majority's treatment of the merits of the boundary issue. Were I to reach the issue, I would follow the exhaustive and thoroughly researched opinions of the federal courts, both trial and appellate. See Ute Indian Tribe, 773 F.2d 1087; Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D. Utah 1981). They constitute an adequate remonstrance to the majority's disposition of the issue. Specifically, those decisions followed the approach dictated by the Supreme Court in determining whether the various enactments at issue demonstrated a congressional intent to diminish reservation boundaries. That court has said that, in the



absence of "substantial and compelling evidence of a congressional intention to diminish Indian lands," the courts' "traditional solicitude for the Indian tribes" must compel a finding that "the old reservation boundaries survived the opening." Solem v. Bartlett, 465 U.S. 463, 472 (1984) (emphasis added) (quoted in Ute Indian Tribe, 773 F.2d at 1089); accord Rosebud, 430 U.S. at 586 ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." (Citation omitted)). The Tenth Circuit and the district court viewed the relevant statues with this perspective, see 773 F.2d at 1089; 521 F. Supp. at 1110 n. 118; a close reading of the majority decision here demonstrates that it does not.

There are times when I, as a state court judge, lament what might be fairly characterized as the second-guessing of our decisions by federal courts simply because they do not like a result we may have reached. See, e.g., Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991) (disagreeing with State v. Lafferty, 749 P.2d 1239 (Utah 1988)) cert. denied sub nom. Cook v. Lafferty, 112 S. Ct. 1942 (1992). The present case puts that shoe on the other foot, an exercise that may be ironic, but is even less defensible. The federal government is, after all, supreme on questions that fall within its purview. In this situation, federal statutory law is at issue, the federal trust responsibility to the Indian tribe is at issue, and it was the federal courts that adjudicated the boundary question years ago. As of today, federal supremacy and Supreme Court review of this court's decision provides the only remaining hope for the Ute Tribe, one of those "weak and defenseless people who are the wards of the nation, [and who are] dependent

upon its protection and good faith," Rosebud, 430 U.S. at 586, for what little is left of the patrimony they held before the whites came to this continent.

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## APPENDIX C

**United States Court of Appeals,**
**Tenth Circuit.**

**Nos. 81-1827, 81-1901.**

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The UTE INDIAN TRIBE,
*Plaintiff-Appellant and Cross-Appellee,*
v.
The STATE OF UTAH,
*Defendant-Appellee,*

**Duchesne County, a political subdivision of the State of Utah, Roosevelt City, a municipal corporation, Duchesne City, a municipal corporation, and Uintah County, a political subdivision of the State of Utah, Defendants-Appellees and Cross-Appellants.**

Indian tribe brought action seeking declaratory and injunctive relief establishing exterior boundaries of reservation. The United States District Court for the District of Utah, Central Division, 521 F.Supp. 1072, Bruce S. Jenkins, Chief Judge, determined that except for specific acts, all lands within original boundaries or reservation remained Indian country, and concluded that Uncompahgre Reservation had been disestablished, and appeals were taken. The Court of Appeals, 716 F.2d 1298, affirmed in part and reversed in part. On motion for rehearing, the Court of Appeals, William E. Doyle, Circuit Judge, held that: (1) Uintah Reservation was not diminished, and (2) Uncompahgre Reservation was not diminished.



Affirmed in part and reversed in part.

Seymour, Circuit Judge, filed concurring opinion in which Holloway, Chief Judge, and McKay and Logan, Circuit Judges, joined.

Seth, Circuit Judge, filed dissenting opinion in which Barrett, Circuit Judge, joined.

Daniel H. Israel of Cogswell & Wehrle, Denver, Colo., and Martin Seneca, Reston, Va. (Scott B. McElroy and Julian M. Izbiky of Cogswell & Wehrle, Denver, Colo., and Robert Thompson, Fort Duchesne, Utah, with them on brief), for plaintiff-appellant/cross-appellee Ute Indian Tribe.

Dallin W. Jensen, Sol. Gen., Salt Lake City, Utah (David Wilkinson, Utah Atty. Gen., and Michael M. Quealy, Asst. Atty. Gen., Salt Lake City, Utah, with him on brief), for defendant-appellee State of Utah.

Tom D. Tobin, Tobin Law Offices, P.C., Winner, S.D. (Dennis L. Draney, Roosevelt City Atty., Roosevelt, Utah, Ronald Uresk, Duchesne City Atty., Roosevelt, Utah, and David Albert Mustone, Tobin Law Offices, P.C., Washington, D.C., with him on brief), for defendants-appellees/cross-appellants Cities and Counties.

Carol E. Dinkins, Asst. Atty. Gen., Robert L. Klarquist and Martin Green, Dept. of Justice, Washington, D.C., on brief for amicus curiae U.S.

Before HOLLOWAY, Chief Judge, and SETH, DOYLE, BARRETT, McKAY, LOGAN and SEYMOUR, Circuit Judges.

### ON REHEARING EN BANC

WILLIAM E. DOYLE, Circuit Judge.

The above entitled matter was considered by the court en banc on the motion for rehearing. The result was that

the majority of the Judges decided that there should be reconsideration and a different result. It will be recalled that in the dissenting opinion which was written previously, this writer agreed with the position which has been taken by District Judge Jenkins (*Ute Indian Tribe v. State of Utah,* 521 F.Supp. 1072 (D.Utah 1981), who generally ruled that the Uintah Reservation and its lands remain the property of the tribes that are involved. As to the questions whether the acts dealing with the Uintah Forest and the Uncompahgre Reservation mean that the Indians lost title to these lands, the view of this writer is contrary to the view of the trial court.

## I.

## THE UINTAH ISSUE

With respect to the case against disestablishment, it was even clearer in connection with the Uintah Indian Reservation than the other areas. The district court pointed out in its opinion that the Act of May 5, 1864, 13 Stat. 64, which established the Uintah Reservation provided that "the lands within the Uintah Reservation should be 'set apart for the permanent settlement and exclusive occupation of the Indians.'" 521 F.Supp. 1072 at 1111, quoting H.R.Rep. No. 660, 53d Cong., 2d Sess., 1-3 (1894). The Uintah Reservation was thus clearly established as a permanent home for the Ute Tribe. Considering that Congress' intent to establish and set aside the Uintah Reservation was clearly expressed, disestablishment of that reservation would require an equally clear expression of congressional intent to change the status of the reservation.

Recently the Supreme Court decision in *Solem v. Bartlett,* 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), clarified that only in two types of situations should courts find that Congress intended to disestablish an Indian reservation. The first of these is when Congress uses explicit



language of cession in an opening act and also gives indication of an unconditional commitment to compensate Indians for their opened lands. 104 S.Ct. at 1166. The other situation is when "events surrounding the passage of a surplus land act, particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress—unequivocally reveal a widely-held contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation. . . ." *Id.* But neither the intent behind the Indian Appropriations Act of 1905, ch. 1479, 33 Stat. 1048, [hereinafter cited as 1905 Act] that allegedly diminished the Uintah Reservation, nor the language used in that Act, is sufficiently clear to support a finding that the Act disestablished or diminished the Uintah Reservation. Indeed the language used in that Act is sufficiently clear to support a finding that the Act did not disestablish or diminish the Uintah Reservation. Neither the language used in that Act nor any other aspect of it gives clear support for a finding that the Act disestablished or diminished the Uintah Reservation. Nor does the legislative history support the allegation approached.

The original opinion, 716 F.2d 1298, in this case inferred, from a series of laws passed between 1902 and 1905, that Congress intended to diminish the size of the Uintah Reservation. The opinion stated that Congress' intent in passing the Indian Appropriations Act of 1902, ch. 888, 32 Stat. 245, [hereinafter cited as 1902 Act] was to disestablish the Reservation and that its original intent carried through to the 1905 Act that actually opened the Reservation to non-Indian settlers. The object of this was certainly different from the conclusion that was set forth. But we now conclude that no intention to alter the Reservation's boundaries was present. Actually the intent was to open the Reservation to non-Indian settlers and this couldn't effect the result that was suggested.

The district court's opinion was indeed well researched on this question, and others as well. The 1902 Act would have returned all surplus Uintah Reservation lands to the public domain if the Ute Tribe's consent could be obtained. That consent was never forthcoming. The Tribe refused all requests to give up their lands. As a result of the impasse, Congress passed additional legislation in 1903 and 1904 extending the time set for the opening of the Reservation. *See* Indian Appropriations Act of 1903, ch. 994, 32 Stat. 982, 997-98; Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-08. Finally, Congress passed the 1905 Act, opening the Reservation for non-Indian settlement under the homestead and townsite laws. This measure, which actually effected the opening of the Reservation, did not contain the public domain language used in the 1902 Act.

It is not possible to find that the series of congressional enactments summarized above revealed a "baseline purpose of disestablishment," 716 F.2d at 1312, that carried through into the 1905 Act. To do so is inconsistent with the Supreme Court's longstanding directive, reiterated in *Solem*, that in the absence of "substantial and compelling evidence of a congressional intention to diminish Indian lands," the courts' "traditional solicitude for the Indian tribes" must compel a finding that "the old reservation boundaries survived the opening." 104 S.Ct. at 1167. It is impossible to draw disestablishment conclusions or inferences from these congressional statements.

An examination of the 1902-1905 series of Congressional enactments with the proper "solicitude for the Indian tribes," *Solem*, at 1167, provides inferences against diminishment. The district court's initial decision that the Uintah Reservation was not disestablished or diminished is correct. The strongest inference that is to be drawn from Congress' actions is that Congress wished surplus Uintah Reservation lands to be put to productive use. With respect to the Reservation's boundaries, the only inference that can be drawn is that Congress had no intention for



them to change. Congress' use of "homestead and township acts" language in the 1905 Act, as contrasted with its use of "public domain" language in the 1902 Act, is evidence of a clear retreat from any desire to effect a wholesale diminishment of the Reservation.[1]

The original opinion's conclusion that the Uintah Reservation was diminished by the 1905 Act is not correct. Indeed we accept the district court's view that the Reservation's boundaries were not changed by the 1905 Act.

## II.

## THE FOREST RESERVE PROBLEM

We will next discuss the status of the 1,010,000 acres of the Uintah Forest Reserve, which was set aside under the authority of the 1905 Act. The Act provided:

> That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary.

33 Stat, at 1070.

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[1] The brief submitted by the Cities and Counties suggests that the 1905 Act necessarily diminished the Uintah Reservation because BIA personnel and local residents immediately thereafter began referring to the "former" reservation. These contemporaneous interpretations of the Act are entitled to little weight. Congress' authority over reservations is plenary, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903), and it is Congress' intent that must govern our decision. The interpretation, wishful or not, given to the 1905 Act by whites living in the Reservation area cannot overcome the lack of compelling evidence that Congress intended to diminish the Uintah Reservation.

There is nothing in the 1905 Act or in its legislative history which establishes a "total surrender of tribal interests" or a "widely-held contemporaneous understanding that the affected reservation would shrink," as required by *Solem*, 104 S.Ct. at 1166. The act merely authorized President Theodore Roosevelt to set apart reservation lands as a forest reserve. This he did. Proclamation of July 14, 1905, 34 Stat. 3113. Indeed the 1905 Act specifically reserved the Utes' timber interests in the lands by authorizing forest officials to sell as much timber as could be safely sold for fifteen years and to pay the money to the Utes. 33 Stat. at 1070.

There is clear evidence that Congress did not intend to extinguish the forest lands of the Uintah Reservation. That evidence is shown when the 1905 Act is contrasted with the Act of Apr. 4, 1910, ch. 140, 36 Stat. 269. The latter clearly extinguished a portion of the reservation lands for reclamation purposes. The reclamation lands were originally set aside under the authority of the 1905 Act. This was in the same manner as the forest lands which had been set aside. Yet five years later Congress showed that it could be explicit when it dealt with the reclamation lands. It said: "All right, title and interest of the Indians in the said lands are hereby extinguished, and control thereof shall pass to the owners of the lands irrigated from said project. . . ." 36 Stat. at 285. In contrast, Congress never enacted a subsequent statute extinguishing the Utes' interests in the lands withdrawn for the forest reserve.

Also, when Congress compensated the Utes for 973,779 acres of the forest lands in 1931, it recognized the lands as "belonging to such Indians." Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092.

Despite the fact that neither the language of the 1905 Act nor its legislative history evidences congressional intent to remove the forest lands from the Uintah Reservation, the district court and this court in its original opinion concluded that the reservation had been diminished because withdrawal of lands for a forest reserve was inconsistent with continued reservation status. 521 F.Supp. at 1138; 716 F.2d at 1314. In reaching this decision, both courts stressed that the administrative authority over the forest lands was transferred from the Department of the Interior to the Department of Agriculture. Such a change in the administration of the lands, however, does not rise to the level of a subsequent event establishing clear congressional purpose to diminish, as required by *Solem*, 104 S.Ct. at 1166-67.[2]

We therefore conclude that the Uintah Reservation was not diminished by the withdrawal of the national forest lands.

## III.

## THE UNCOMPAHGRE RESERVATION

Following rehearing it became necessary to consider the status of the Uncompahgre Reservation in Utah. This is said to be the least popular of the group. The position which is taken by the district court and by this court in the earlier opinion was that the entire Uncompahgre Reservation had been disestablished. However, there is a lack of evidence of this fact unless there can be disestablishment by failure to develop the area. The State of Utah supports the district court's original decision. Under the *Solem* standards neither the Uncompahgre Reservation nor the Uintah Reservation has been disestablished or diminished by any of the congressional enactments in question. It must be mentioned, however, that this is, for the most

[2] The applicable forest service laws mentioned in the 1905 Act are limited by 16 U.S.C. § 480, which provides that criminal and civil jurisdiction is not affected by the existence of a national forest. Thus, Indian jurisdiction does extend to Indians on forest lands.

part, a very dry area whose highest value, in addition to agriculture, is its mineral deposits, such as gilsonite, etc. On this account, there is some interest on the part of development parties.

It is interesting to note that there exists no clear expression of congressional intent to disestablish the affected areas, including this one, as contemplated by the court in *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

In *Solem* it was found that it was difficult to disestablish an Indian reservation. It went on to say Congress must "clearly evince" an intent to change boundaries before diminishment will be found. *Id.* The *Solem* test for determining whether tracts remain a reservation emphasizes this factor. The *Solem* court also stated that subsequent events such as demographic transformations of the area should be examined and regarded. However, subsequent events should be assessed to a "lesser extent" than the statutory language and surrounding circumstances. *Id.* .

We now turn to apply these principles to the 1894 and 1897 Acts.

In 1894, bills were introduced providing "for opening the Uncompahgre and Uintah Reservations." H.R. 4511, 6557, 53d Cong. 2d Sess. (1894); see S.Rep. No. 450, 53d Cong., 2d Sess., 4027 (1894). It is to be noted that these bills were never enacted. However, the Indian Appropriations Act for 1894 included H.R. 6557, with changes. We first consider the 1894 Act's operative language, set forth below.[3]

[3] Sec. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands according to the treaty of eighteen hundred and eighty, as follows: Allotments in severalty of said lands shall be made as follows: To each head of a family one-



The 1897 statute which ultimately opened the Uncompahgre Reservation provided:

> The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncom-

quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each other person under eighteen years of age, born prior to such allotment, one-eighth of a section, with a like quantity of grazing land: *Provided*, That, with the consent of said commission, any adult Indian may select a less quantity of land, if more desirable on account of location: *And Provided*, That the said Indians shall pay one dollar and twenty-five cents per acre for said lands from the fund now in the United States Treasury realized from the sale of their lands in Colorado as provided by their contract with the Government. All necessary surveys, if any, to enable said commission to complete the allotments shall be made under the direction of the General Land Office. Said commissioners shall, as soon as practicable after their appointment, report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.

Sec. 21. That the remainder of the lands on said reservation, shall, upon the approval of the allotments by the Secretary of the Interior, be immediately open to entry under the homestead and mineral laws of the United States: *Provided*, That no person shall be entitled to locate more than two claims, neither to exceed ten acres, on any lands containing asphaltum, gilsonite, or like substances. *Provided*, That after three years actual and continuous residence upon agricultural lands from date of settlement the settler may, upon full payment of one dollar and fifty cents per acre, receive patent for the tract entered. If not commuted at the end of three years the settler shall pay at the time of making final proof the sum of one dollar and fifty cents per acre.

Sec. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed

> pahgre Ute Indians now located upon or belonging to the Uncompahgre Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.

We mentioned above that there is some interest due to the presence of minerals and it should be mentioned here that the land contains gilsonite and other minerals and unquestionably there is more interest in these features than in limited agricultural activites that have operated in the area.

The question as to whether the statutory language of the 1894 and 1897 acts disestablished the Uncompahgre Reservation calls for an interpretation based on historical research. This court's previous opinion concluded that the statutory language of the 1894 Act established a "baseline" purpose to disestablish which the 1897 Act executed. 716 F.2d at 1306. The opinion read the term "restore to public domain" in the 1894 Act as an indication of a clear congressional intent to remove the Uncompahgre land from the Indians. Our conclusion is that the phrase "restore to the public domain" is not the same as a congressional state of mind to disestablish. In other words, it doesn't disturb

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for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress.



the ownership of the land by the tribal group. There are several competing meanings that could be implied from the phrase "restore to the public domain." But the most important one is that it permits the invasion of an area and purchase of land and general utilization. It is said that it is equally plausible that the phrase means that Indian lands would be available for settlement, but that the boundaries remain unchanged. The original expression "return to the public domain" does not reliably establish the clear and unequivocal evidence of Congress' intent to change boundaries. *Solem*, 104 S.Ct. at 1166.

Our reading of the statutory language of the 1894 and 1897 Acts indicates that there is no explicit language of cession, termination, or any other reference to " the present and total surrender of all tribal interests." *Id.* The provisions of these acts are in sharp contrast to the statutory language in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) where "termination" was found. *See also Mattz v. Arnett*, 412 U.S. 481, 504, 93 S.Ct. 2245, 2257, 37 L.Ed.2d 92 (1973). Secondly, we have not found any language which promises the Indians any certain sum for their lands as in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 591, 97 S.Ct. at 1365.

As in *Solem*, 104 S.Ct. at 1169, the references in the 1894 Act to being in "the public domain" and being "open to entry" do not present "an explicit expression of congressional intent to diminish" the Uncompahgre Reservation. We fully agree with this viewpoint.

The circumstances surrounding the passage of the Acts also fail to establish a clear congressional purpose to disestablish the Reservation. Our reading of the Act's objectives is that they merely opened lands to public entry and failed to extinguish the Reservation.

Our conclusions are first, that the opening of the Uncompahgre Reservation was never formally or informally negotiated between the federal government and the Tribe

of Indians. There was never an understanding on the part of the Tribe that they would lose their reservation as a result of the 1897 Act. The Uncompahgres never bargained for the termination of the exterior boundary of their reservation. For example, in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. at 584, 97 S.Ct. at 1361 and *DeCoteau v. District County Court,* 420 U.S. 425, 446, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975), the Court found formal negotiation between the tribes and the federal government which resulted in termination. Unlike these earlier cases, the Uncompahgre Indians had no understanding that they were losing their reservation in exchange for a specific benefit.

It is true that the other evidence as to "surrounding events" is ambiguous. The Cities and Counties cite newspaper articles from the period which refer to the Uncompahgre Reservation as the old or former reservation. No particular significance can be given to these articles since they were written from the white settlers' points of view. But these statements do not enjoy any official significance. *DeCoteau v. District County Court,* 420 U.S. at 443, n. 27, 95 S.Ct. at 1092, n. 27.

We agree with the Tribe that the restoration of vacant and undisposed lands in 1948 is suggestive of continued reservation status. *See Mattz v. Arnett,* 412 U.S. 481, 505-06, n. 25, 93 S.Ct. 2245, 2258 n. 25, 37 L.Ed.2d 92. The conclusion to be drawn is that the surrounding events concerning the 1894 and 1897 Acts are ambiguous. They provide no substantial and compelling evidence of a congressional intention to diminish Indian lands. *Solem,* 104 S.Ct. at 1167. The inconclusive nature of this evidence leads us to the conclusion of *Solem:* "We are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and the the old reservation boundaries survived the opening." *Id.* at 1167 (citations omitted). Therefore, we hold that the Uncompahgre Reservation has not been disestablished or diminished.



In summary, we conclude that there are no explicit references to boundary changes and disestablishment in the language of the 1894 or 1897 Acts. We also conclude that there is no evidence of a widely-held understanding on the part of the affected Tribe that the Uncompahgre Reservation would be disestablished.

## IV.

## CONCLUSION

In closing, we find no evidence, either explicit or implicit, in any congressional enactment that Congress intended to diminish or disestablish the Uncompahgre and Uintah Reservations. We reverse the district court holding insofar as it found the Uncompahgre Reservation disestablished and the Uintah Reservation diminished by the withdrawal of the forest lands. In all other respects we affirm the district court's decision.

SEYMOUR, Circuit Judge, with whom HOLLOWAY, Chief Judge, and McKAY and LOGAN, Circuit Judges, join, concurring.

I concur in Judge Doyle's opinion holding that Congress did not disestablish either the Uintah Reservation, in whole or in part, or the Uncompahgre Reservation. The views expressed by both Judge Doyle and the district court in *Ute Indian Tribe v. State of Utah,* 521 F.Supp. 1072 (D.Utah 1981), amply support this conclusion with respect to the Uintah Reservation as a whole. However, the district court held that Congress had extinguished that portion of the Uintah Reservation designated as a forest reserve, and all of the Uncompahgre Reservation. I write separately from Judge Doyle to amplify those points I find critical to his conclusion that the district court erred in this respect.

## I.

## UNCOMPAHGRE RESERVATION

The claim that Congress has never disestablished the Uncompahgre Reservation poses a difficult analytical problem. Although both the district court and the panel decided that the reservation had been disestablished, neither court had the advantage of evaluating the issue in light of *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). *Solem* is particularly helpful in this instance, and a review of its premises will assist our analysis.

*Solem* recognizes that Congress passed a number of surplus land acts at the turn of the century, in response both to pressure for new land and to the prevailing view that Indians should be assimilated into American society through transition to a private agrarian economy. *See Solem*, 104 S.Ct. at 1164. The land acts were intended to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement.[1] *Id.* Because each of these land acts was "the product of a unique set of tribal negotiation and legislative compromise," *id.*, each act must be construed independently to determine whether it resulted in actual disestablishment or diminishment of a reservation.

This task is complicated by Congress' failure to distinguish between property interest, i.e., or title to the land in question, and reservation status. During the relevant period, ownership of the land and its assets provided the

[1] The General Allotment Act of 1887, ch. 119, 24 Stat. 388, gave the President discretion to allot reservation lands to resident Indians and, with tribal consent, to sell surplus lands. A transitional act, it maintained the reservation system but tried to facilitate the allotment process. The Act envisioned the abolition of the reservation system only after this process was complete. *See Mattz v. Arnett*, 412 U.S. 481, 496-97, 93 S.Ct. 2245, 2253-54, 37 L.Ed.2d 92 (1973). Congress later enacted specific legislation to assure the opening of a particular reservation. *Id.* at 497, 93 S.Ct. at 2254.



focus of congressional interest. *See, e.g.*, 30 Cong.Rec. 816-40 (1897) (LD 45).[2] "Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries." *Solem*, 104 S.Ct. at 1165 (citing Act of June 25, 1948, ch. 645, § 1151, 62 Stat. 757 (codified at 18 U.S.C. § 1151)). Consequently, allotment in severalty to individual Indians and subsequent entry by non-Indians is entirely consistent with continued reservation status. *See Mattz v. Arnett*, 412 U.S. 481, 497, 93 S.Ct. 2245, 2254, 37 L.Ed.2d 92 (1973).

Moreover, at the turn of the century, members of Congress assumed that Indians would eventually be assimilated and the reservation system then dismantled. They were therefore less concerned with the effect of a statute on reservation boundaries than in opening the land to non-Indians. *Solem*, 104 S.Ct. at 1164-65. This expectation never came to pass, but it contributed to the ambiguity of certain statutory language and the anticipated effect of that language. These considerations are essential in evaluating the Tribe's claim.

With this context in mind,[3] *Solem* directs us to look to the language of the particular act and the circumstances underlying its passage to determine whether Congress clearly evinced an intent to change boundaries. *Id.* at 1165-66. Appropriately, the most probative evidence of congres-

[2] The record on appeal includes a Joint Compendium of Legislative Documents including Executive Orders, Presidential Proclamations, and certain Secretarial Orders, compiled and used by the district court. *See* Rec., vol. XI, XII. In addition to formal citation form, these sources are referred to parenthetically by their corresponding compendium index numbers, LD 1 to LD 217.

[3] *Solem* cautions that the Court has "never been willing to extrapolate from this expectation [of demise of the reservation system] a specific congressional purpose of diminishing reservations with the passage of every surplus land act." *Solem*, 104 S.Ct. at 1165. Nor will diminishment be "lightly inferred." *Id.* at 1166.

sional intent is the statutory language used to open Indian lands. *Id.* at 1166. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* Explicit language of cession is not, however, a prerequisite for a finding of diminishment. When such language is missing, we must determine whether "events surrounding the passage of a surplus land act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress—*unequivocally* reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation. . . ." *Id.* (emphasis added).

The first surplus land act which pertains to the Uncompahgres was adopted in 1894. *See* Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-38 (LD 35). The Act provided for allotment of land to the Indians for which they would be required to pay. The Act further provided that unallotted land, i.e., land considered either unsuitable or unnecessary for the Indians' needs, "shall, by proclamation, be restored to the public domain and made subject to entry [under the homestead and mineral laws of the United States]." *Id.* ,§ 20 at 337. Although the district court and the panel viewed this as language of cession, I believe that *Solem* dictates a different result. The act at issue in *Solem* used the term "public domain" in reference to the lands within the purported reservation, as well as the phrase "within the respective reservations thus diminished." *Solem,* 104 S.Ct. at 1168-69. The Court acknowledged that these isolated references might support a finding of diminishment, but found them "hardly dispositive" when balanced against the "stated and limited goal of opening up reservation lands for sale to non-Indian settlers." *Id.* at 1169. The Court further noted that there was "considerable doubt as to what Congress meant in using these



phrases . . . [since] unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." *Id.* at 1169 n. 17 (citations omitted).

Ultimately, I interpret *Solem* to hold that "public domain" language standing alone is insufficient to support a finding of explicit congressional intent to disestablish. In the case before us the ambiguity of the term is only heightened by its subsequent exclusion from the 1897 Act. *See* Act of June 7, 1897, ch. 3, 30 Stat. 62 (LD 49). Much of the text of the 1894 Act vanished in the 1897 Act, the act that actually succeeded in opening the reservation.[4] The operative phrase which used the term "public domain" was replaced by the following:

> "[A]ll the lands . . . not theretofore allotted in severalty to said Uncompahgre Utes shall . . . be *open for location and entry under all the land laws of the United States;* excepting . . . all lands containing gilsonite, asphalt, elaterite, or other like substances."

*Id.* at 87 (emphasis added). The panel and the district court equated this language with the earlier "public domain" language. Prior to *Solem,* "public domain" language could have been construed as more conclusive evidence of disestablishment; following *Solem,* the term must be viewed as ambiguous in portent, especially since the change in the 1897 Act reveals Congress' preoccupation with title to the opened lands. As *Mattz* reminds us, under these surplus land acts, allotment is entirely consistent with continued reservation status. *Mattz,* 412 U.S. at 497, 93 S.Ct. at 2254. More emphatically, "[o]nce a block of land is set

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[4] The terms of the 1894 Act were never fulfilled and the effort to impose the Act on the Uncompahgres was dropped in 1896. *See* S.Doc. No. 32, 55th Cong., 1st Sess. 2 (1897) (LD 46). The 1897 Act is the critical one before us, and I can see no reason to infer a baseline purpose of disestablishment from the ambiguous terms of the unrealized 1894 Act.

aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem,* 104 S.Ct. at 1166. In this light, we cannot read the operative language of the 1897 Act as an explicit indication of congressional intent to disestablish.

We must therefore consider whether events surrounding the passage of the Act "unequivocally reveal a widely-held, contemporaneous understanding" that the reservation boundaries would be extinguished. *See id.* The Supreme Court has found disestablishment in one case where explicit language of cession was missing. In *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), the Rosebud Sioux Tribe voted in favor of an agreement to cede a portion of their reservation in exchange for a sum certain. Congress then passed a series of bills which incorporated the cession language but slightly altered the compensation provision. Although none of the acts clearly severed the Tribe's interest in the unallotted opened lands, the Court held that the statutory language read in conjunction with the agreement by the Tribe unequivocally demonstrated congressional intent to diminish. *Id.* at 587-88, 97 S.Ct. at 1363-64; *see also Solem,* 104 S.Ct. at 1165-66 n. 10.

We have no such agreement here. In fact, it is clear that the Uncompahgre Tribe vociferously opposed the terms of the 1894 Act, a fact which resulted in the failure of the allotment program. *See, e.g.,* S.Rep. No. 450, 53d Cong., 2d Sess. 1 (1894) ("they have from their long residence upon their present reservation acquired a conviction that the lands belong to them") (LD 27); H.R.Doc. No. 191, 54th Cong., 1st Sess. (1896) (Secretary of Interior response to order asking why the 1894 Act had not been implemented) (LD 39); S.Doc. 32, 55th Cong., 1st Sess. (1897) (relating fact that effort to allot pursuant to 1894



Act ceased in 1896) (LD46).[5] Therefore, other circumstances must unequivocally reveal an intent to disestablish before we can affirm the judgment of the district court.

Legislative reports make clear that Congress perceived no legal obligation to obtain the consent of the Uncompahgres, even though the Supreme Court had not yet decided that Congress could unilaterally disestablish a reservation without Indian consent. *See Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). This is so because Congress had been informed that the Uncompahgres were entitled only to temporary occupancy of their reservation until land within the reservation could be allotted in severalty. *See, e.g.,* H.R.Rep. No. 1605, 51st Cong., 1st Sess. 2 (1890); H.R. Rep. No. 660, 53d Cong., 2d Sess. (1894) (LD 30).

The roots of this perception are not exactly clear. Before coming to Utah, the Uncompahgres had occupied a reservation in Colorado. In 1880, they were induced to cede their interest in that reservation and agreed

> "to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah."

Act of June 15, 1880, ch. 223, § 1, 21 Stat. 199, 200 (LD 11). The Act authorized the President to appoint a commission to identify eligible Indians and allot to them land in severalty within the prescribed areas. *Id.,* § 2 at 202-203. The Act further directed the Secretary of the Interior

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[5] As did congressional debate, negotiations with the Indians focused on whether they would have to pay for their allotments. This requirement was eventually dropped, but the agreement to participate in the allotment program does not imply an understanding that the reservation boundaries would disappear.

to identify "a sufficient quantity of land in the vicinities named . . ., to secure the settlement in severalty of said Indians. . . ." *Id.*, § 3 at 203. Once the Secretary had done so, and the allotment process had been completed, the Act contemplated that "all the lands not so allotted, the title to which is [by this agreement] released and conveyed to the United States, shall be held and deemed to be public lands. . . ." *Id.* Finally, the Act provided that the Indians holding allotments would be subject to the civil and criminal laws of the state or territory in which they resided "with the right to sue and be sued in the courts thereof." *Id.*, § 4 at 204.

Had nothing been done between the date of this agreement and the 1897 Act, it is arguable that the Uncompahgres might have had no *jurisdictional* rights or boundaries. *Compare* F. Cohen, *Handbook of Federal Indian Law*, ch. 1, § D3a, at 34-41 (1982) (indicating definition of Indian country under 18 U.S.C.§ 1151 (1982) may not include unrestricted allotted land) *with id.*, ch. 9, § A3a, at 499 (reservation may be established without formal executive order if administrative action reveals purpose of inducing a tribe to settle in a designated area and subsequent treatment as a reservation). However, two years later, on January 5, 1882, President Arthur established the Uncompahgre Reservation by an Executive Order. (LD 12). Nothing in the 1880 Act required him to do so; in fact, the Secretary and the Commissioner had been empowered to designate appropriate land for allotment. He may have felt obligated to create the reservation simply because no land was "found" or "available" to the Uncompahgres in Colorado. Instead, the Tribe was forced to settle in a barren region of Utah no one else yet wanted, where there were, at most, 10,000 acres of arable land out of the nearly two million acre reservation. Although the 1880 Act spoke only in terms of title to land, the subsequent Executive Order indisputably created jurisdictional rights for the Uncompahgres. It is well settled that



a reservation created by executive order has the identical legal status as one created by Congress. *See Mattz*, 412 U.S. at 492-94, 93 S.Ct. at 2251-53. Moreover, since title and reservation status are not congruent concepts, the 1882 Executive Order in no way interfered with Congress' intent that the Uncompahgres hold no title to the land.[6] It merely provided a reservation within which, until the allotment process was complete, the Uncompahgres had temporary occupancy of the whole.[7]

Following allotment, the lands could be and were opened to public purchase and settlement. Any unallotted land would then be returned to the United States, leaving only individual tribal members with allotments in severalty. *See* Act of June 15, 1880, § 3 (LD 11). But in my view it is clear that this title arrangement did not undermine the jurisdictional boundaries created by the 1882 Executive Order. The end result was an Indian reservation where the Indians held title to their allotted parcels and the remainder of the land was opened to the public.

This analysis is supported by the focus on mineral deposits during congressional debates over the 1897 Act. *See*

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[6] The order did withhold the land from sale, presumably to permit the completion of the allotment process. The 1894 and 1897 Acts would have been needed in any event to reopen the land for sale to non-Indians. It became clear that the legislation was necessary to spur the stalled allotment process. By the 1890s, Congress was also under pressure to open the land to permit mining interests to enter.

[7] The fact that the Uncompahgres did not own the land within their reservation explains why members of Congress and others considered the Uncompahgres to be in a different position than the Uintahs, who did hold title to the land within their reservation. It also explains why the United States did not have to pay the Uncompahgres for the land subsequently opened to the public. That the Uncompahgres only had temporary occupancy rights within the reservation before they received their allotments, however, does not undermine their claim that the jurisdictional boundaries were never extinguished, given the distinction between title and jurisdiction.

*Ute Indian Tribe,* 521 F.Supp. at 1104; *see generally* 30 Cong.Rec. 102-08, 712-20, 725, 814-21, 826-33, 1070, 1110-20, 1130, 1208-11, 1245, 1253, 1468 (1897) (LD 45). The reservation was recognized as practically barren and valuable only for its extensive deposits of gilsonite, a mineral previously monopolized by foreign producers. Congress was deeply concerned with providing access to these minerals while preventing monopolization by a few mining interests; hence the provision in both the 1894 and 1897 Acts limiting the number of claims any person could post. Congress was also confused as to the exact nature of the Uncompahgres' interest in the land, as indicated by the remarks of Representative Maguire of California in 1897:

> "Gentlemen say here that these gilsonite deposits are of no value, but the Government experts report that they are of immense value, and the struggle to secure them through the medium of this amendment shows that they are so regarded by the representatives of private interests. I do not care which statement may be true. If the deposits in question be a great body of valuable public property belonging to the citizens of the United States, we ought not to give them away in the manner proposed. If as the gentlemen from Colorado [Rep. Shafroth] has stated, they have no value, then we ought not to disturb the Indians who are now using the lands in which they lie. They should be permitted to use the land as long as it serves their purposes; certainly until another reservation shall be found for them.
>
> It is urged on the one hand that the Indians have title to or at least a vested interest in these lands, and on the other it is denied that they have any such title or interest. Respectable legal opinions have been cited on both sides, showing at least that the question is not free from doubt. Are we, upon ex parte and hasty statements of law and fact, to arbitrarily decide this question against the unrepresented Indians, and



> drive them ruthlessly from this reservation, without even the suggestion that we will not or hereafter provide them with another?"
> 30 Cong.Rec. at 828-29 (LD 45).
>
> These remarks once again reveal Congress' preoccupation with title as well as its general confusion regarding the nature of the Uncompahgres' rights in the reservation. Given such ambiguous circumstances, it is impossible to derive any clear indication of whether Congress intended merely to open the reservation or to disestablish it. Under *Solem,* we are bound to resolve this ambiguity in favor of the Tribe. Judge Jenkins, in his thoughtful opinion, correctly pointed out the lack of congressional statements indicating that the Uncompahgre Reservation was intended to survive the opening, 521 F.Supp. at 1107, but he applied the wrong test in inferring disestablishment from this fact. Explicit congressional intent to alter reservation boundaries must be affirmatively shown.
>
> "When both an act and its legislative history fail to provide *substantial and compelling evidence of a congressional intention to diminish* Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening."

*Solem,* 104 S.Ct. at 1167 (emphasis added).

Undeniably, Congress could be explicit when it chose to be. *See Mattz,* 412 U.S. at 504-505 & n. 22, 93 S.Ct. at 2257-2258 & n. 22. Congress was completely clear when it terminated Uintah rights in the Gilsonite Strip, *see* Act of May 24, 1888, ch. 310, § 1, 25 Stat. 157 (LD 18), and the Strawberry Reservoir Project lands, *see* Act of April 4, 1910, ch. 140, § 23, 36 Stat. 269, 285 (LD 139); *see also* Act of June 15, 1880, § 1, 21 Stat. 199, 200 (LD 11)

(ceding the Ute Colorado lands to the United States). However, no explicit language of cession can be found in either the 1894 or 1897 Acts or in their legislative history. Moreover, surrounding circumstances do not indicate a widely-held contemporaneous understanding that the *reservation boundaries* would disappear, as opposed to a transfer of the title to the lands. I believe that this is so because Congress truly was not concerned about the implications for the Indians of continued reservation status, because it anticipated the future demise of the reservation system and envisioned no influx of white settlers to that barren region. *See Solem,* 104 S.Ct. at 1164-65. Instead, Congress was concerned solely with title and access to the unique mineral deposits found there.

In addition, the subsequent history of the region does not compel a finding of disestablishment. Few people, Indian or non-Indian, live there today. The character of the area has not changed to such an extent that the reservation has de facto disappeared. *See id.* at 1167. Finally, although *Solem* accords subsequent treatment of the area by the federal government and local authorities "some evidentiary value," *id.*, these later events are not dispositive of congressional intent at the time of opening. Had such events resulted in a dramatic change in the character of a region, they would weigh more heavily. However, the one event that seems irreconcilable with continued reservation status, the 1948 Hill Creek Extension, *see* Act of March 11, 1948, ch. 108, 62 Stat. 72 (LD 187), in no way changed the character of the region. In fact, it preserved its Indian character. Absent such a change, Congress' action fifty years following the opening of the reservation does not alter my previous conclusion.

Accordingly, given the ambiguity of the statutes, congressional confusion concerning the nature of Indian rights within the reservation and how the legislation would affect those rights, the lack of an agreement with the Uncompahgres concerning cession of their interests, and



the lack of change in the character of the land, I believe that Congress never clearly evinced an intention to disestablish the Uncompahgre Reservation boundaries and that the evidence supporting such a conclusion is neither substantial nor compelling.

## II.

## THE FOREST RESERVE

These same principles support the conclusion that the forest reserve remains within the boundaries of the Uintah Reservation. The 1905 Act provides as follows:

> "That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest reserves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary."

Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1070 (LD 105). Assuming the Uintah Reservation was never disestablished, nothing in this paragraph amounts to explicit language of cession or a total surrender of Indian interests. The Act merely contemplated the opening of the reservation to non-Indians and permitted the United States to reserve those lands it wished to withhold from settlement.

I find nothing in this action inconsistent with continued tribal jurisdiction within the forest reserve, even though the laws governing national forests are comprehensive. In 1897, when Congress set forth some of the details of its policy for management of National Forests, *see* 30 Stat. 34-36, it left room for the limited exercise of jurisdiction by the state in which the forest is located. *See* 30 Stat.

36 (1897) (codified at 16 U.S.C. § 480).[8] Thus it is clear that the goals of the national forest system as of 1905, including protection of the watershed, protection of fish and game, and management of timber resources, *see, e.g.*, 30 Stat. 35 (1897); 33 Stat. 872-73 (1905), could be achieved without taking jurisdiction away from Indian Tribes. Consistent with this analysis, the United States has supported the Tribe's claim to the forest reserve throughout this litigation.

This tribal jurisdiction is limited by federal resource management policy. The U.S. Forest Service and other federal agencies such as the U.S. Fish and Wildlife Service participate in managing the land and resources of a national forest. Because these agencies are arms of the United States entitled to sovereign immunity from the Tribe's dictates, the Tribe has no more authority to interfere with federal management of the Uintah forest reserve as a national forest than would the State of Utah. Federal agencies may choose to incorporate tribal or state laws for fishing, hunting, or the like, or they may preempt these laws by promulgating regulations designed to further federal land management policy.

As a practical matter, therefore, Indian tribal jurisdiction over the forest reserve will permit the Tribe to govern its members, but will not greatly affect non-Indians. National forest land that is on an Indian reservation is similar to land that is privately held within a reservation; it is not "land belonging to the Tribe or held by the United

[8] 16 U.S.C. § (1982) provides:

"The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence . . .; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State."



States in trust for the Tribe." *Montana v. United States*, 450 U.S. 544, 557, 101 S.Ct. 1245, 1254, 67 L.Ed. 2 (1981). The Tribe's power to exercise civil authority over non-Indians on such land covers only conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 101 S.Ct. at 1258.

As Judge Doyle points out, Congress sought to protect Indian interests in the forest lands so reserved and managed. The 1905 Act authorized forest officials to sell as much timber as could be safely harvested and to pay the money to the Utes for fifteen years. The provision only indicates Congress' assumption that the reservation system would be dismantled in the near future. Since we have construed the 1905 Act to open rather than disestablish the Uintah Reservation, this provision does not indicate a present congressional intent to terminate Uintah interests in the forest reserve; indeed, it preserves them. Moreover, Congress recognized that this provision was insufficient to terminate all Indian rights in the land. This fact is indicated by comparing Congress' treatment of a reservoir site in the same Act. The Act authorized the President to "set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development." 33 Stat. 1070. The President did so on August 3, 1905. However, Indian rights were actually terminated only when Congress passed a second statute providing that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished. . . ." Act of April 4, 1910, ch. 140, § 23, 36 Stat. 269, 285 (creating the Strawberry Reservoir Project) (LD 139). In contrast, Congress never specifically terminated Indian interest in the forest reserve lands.

In finding diminishment, the district court expressed concern that the presidential proclamation reserving the forest lands, *see* Proclamation of July 14, 1905, 34 Stat. 3116 (LD 107), was made pursuant to a general act au-

thorizing the President to set apart "*public land* bearing forests . . . as *public reservations.*" Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (LD 25) (emphasis added). In light of the earlier discussion of the implications of public domain language under *Solem,* I cannot see that this language alters my analysis. Congress was opening the reservation to public entry, and the United States was exercising its right to choose first from available land. The United States eventually paid for most of the land it had reserved, *see* Act of February 13, 1931, ch. 124, 46 Stat. 1092 (LD 167), and returned the remaining portion to Ute ownership, *see* Act of July 14, 1956, ch. 603, 70 Stat. 546 (LD 203). Since, as established above, such an exchange of title cannot affect reservation status, the term "public reservation" does not require us to conclude that Congress withdrew the forest reserve from the Uintah Reservation.

Nor does the fact that Congress once created a specifically Indian forest reserve compel such a conclusion. In that instance, Congress deferred to Indian management of the forest lands. Here Congress intended the lands to be federally *managed* as part of the existing Uintah Forest Reserve. As noted above, in light of 16 U.S.C. § 480, I see no conflict between federal management of forest land and continued reservation status.

Finally, I am not persuaded by the panel's reliance on *United States v. Gemmill,* 535 F.2d 1145 (9th Cir.), *cert. denied,* 429 U.S. 982, 97 S.Ct. 496, 50 L.Ed.2d 591 (1976), and *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 206 Ct.Cl. 649 (1975). In those cases, creation of a forest reserve was only one of several factors indicating the unambiguous extinguishment of Indian rights.

In sum, I would affirm the district court insofar as it holds that the Uintah Reservation was not disestablished. I would reverse the district court insofar as it holds that the portion of the Uintah Reservation reserved as a forest and the Uncompahgre Reservation were disestablished.



SETH, Circuit Judge, dissenting.

I must respectfully dissent.

These appeals concern the continued existence of the Uncompahgre and Uintah Indian reservations. The Ute Tribe in Utah fashioned a Law and Order Code which purported to exercise jurisdiction over all the lands within the original Uintah reservation created by executive order in 1861 as well as the Uncompahgre Indian reservation created in 1882, both in Utah. The State of Utah and several Utah counties and cities questioned tribal jurisdiction over much of this land arguing that a great deal of the Uintah reservation and the whole of the Uncompahgre reservation had been disestablished and was no longer "Indian Country." (18 U.S.C. § 1151.)

This Ute Tribe (the Uintah, White River and Uncompahgre bands) brought suit for declaratory judgment and injunctive relief, requesting that the present extent of the reservations and of tribal jurisdiction be determined. The trial court heard extensive testimony and performed an exhaustive study of legislative and administrative materials relating to the history of both the Uintah and Uncompahgre reservations. The transcript and the record comprise several thousand pages.

As to the Uintah reservation the trial court decided that the original reservation had been changed by several Acts of Congress directed to particular tracts. Thus Congress had removed a 7,040-acre tract known as the Gilsonite Strip in 1888, had removed 1,010,000 acres of land for National Forest purposes in 1905, and had also withdrawn 56,000 acres of land for a reclamation project in 1910. In 1948 the Uintah reservation was increased by 510,000 acres by the addition of the Hill Creek Extension. Except for these specific Acts of Congress, the trial court held that all lands within the original boundaries of the Uintah reservation remained "Indian Country." The individual al-

lotments to Indians, the public law entries by others and some mineral locations were recognized. These were, however, within the exterior boundaries of the reservation.

The trial court concluded that the Uncompahgre reservation had been disestablished.

The resolution of a dispute such as this involving Indian reservations turns on what Congress intended to accomplish at the time as a legal matter. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *see Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). The conclusions of the trial court on this point are persuasive, but are not considered to be findings of fact.

The method of examining legislative history and determining legislative intent in cases concerning Indian reservations has been addressed by the United States Supreme Court in recent times. Four such cases are especially significant to our problem. *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), was decided in 1962 and concerned the Colville Indian reservation. The Court held that the North half of the reservation had been disestablished, but the South half remained in reservation status. The Act of Congress said to have disestablished the North half declared that it should be "vacated and restored to the public domain." 27 Stat. 62, 63. The relevant acts with regard to the South half of the reservation allotted the land pursuant to the Congressional policy expressed in the General Allotment Act of 1887, 24 Stat. 390, but did not contain language of vacation and restoration or the term "public domain." *Seymour,* at 355, 82 S.Ct. at 427. The Court also mentioned subsequent legislative and administrative history of the South half of the reservation to support its conclusion that it was still a reservation. On these grounds the Court held that the South half of the reservation retained its status as Indian Country.



In *Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973), decided in 1973, the Court held that the Klamath River reservation had not been disestablished. The Court made it clear that the allotment of lands within the reservation to resident Indians was consistent with reservation status and an opening for settlement in addition did not disestablish. Thus a more explicit indication of Congressional intent was necessary to disestablish. However, the Court did not rest its decision on the fact that the unequivocal language of vacation and restoration to the public domain that had been present in *Seymour* was absent in *Mattz.* Clearly the Court was unwilling to suggest that there were any special recitations the absence of which would mean that a reservation continued. In addition to considering the historical background of the reservation and the legislative history, the Court observed that several bills which contained clear language of disestablishment passed the House of Representatives but did not pass in the Senate. The Court interpreted the repeated failure of those bills as a sign of Congressional intent that the reservation continue. Thus the crucial point was not simply that the final Allotment Act for the Klamath River reservation lacked language of disestablishment, but that Congress had never at any state permitted such language to be passed into law. It is important that in *Mattz* the Court stated that an opening of a reservation for settlement did not necessarily disestablish the reservation. This was referred to in the *Rosebud* opinion hereinafter considered. The settlement by Indians and non-Indians was considered to be of benefit to the Indians.

The Court in *Mattz* discussed the subsequent jurisdictional history of the reservation as an illustration for its holding of continued reservation status rather than as a foundation for that holding. No detailed analysis of legislative intent was undertaken at the time of the Acts said to constitute disestablishment for any of these cases.

*DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), raised the question of whether the Lake Traverse Indian reservation survived a restoration to the public domain. The Court held that it did not, based also on the express Indian cession of the land. This feature of the *DeCoteau* case has no application to the case at bar but *DeCoteau* is important as to the significance of the phrase "public domain." The Court, in comparing the legislation there in question to other Indian agreements, stated, at 446, 95 S.Ct. at 1094:

> "That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.' "

The Court speaks as if a restoration to the public domain settled the matter of disestablishment. The position of the two phrases suggests that "returned to the public domain" is synonymous with "stripped of reservation status." With regard to the question of jurisdictional history, the fact that the State of South Dakota had exercised virtually undisputed jurisdiction over the land was important to the Court's decision.

*Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), is of overriding importance to the determination of the case before us because it is the most recent Supreme Court case on the subject and because it provides a detailed analysis. The facts of *Rosebud* are similar to those of other disestablishment cases. The language on which the Court relies in finding disestablishment of the reservation in *Rosebud* does *not* contain a phrase analogous or similar to "vacated and restored to the public domain" of *Seymour*. *Rosebud* involved unilateral action by Congress rather than cession by the Indians. *Rosebud* lays out what the Court terms some "well-established legal principles." One of these is the general rule that doubtful expressions are to be resolved in favor of the Indians. The Court cautions that the resolution of doubt in favor of the Indians is not to be done by ignoring clear indications of Congressional intent, nor does this method of resolving doubt intrude on the Court's holding in *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903).



The Supreme Court in *Solem v. Bartlett,* 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), considered the Cheyenne River Act of May 29, 1908. The Act authorized the Secretary to *sell* portions of the reservation within a described area with the proceeds to go to the benefit of the Indians. The opinion considers the older cases herein referred to but only decided the consequences of the Act authorizing sales. It does not provide direction as to our problem.

In *Lone Wolf* the Court held that Congress possessed the authority to abrogate unilaterally the provisions of an Indian treaty. This eliminated the notion that Congressional action with regard to an Indian reservation nvolved some sort of implied contract. After *Lone Wolf* in 1903 established that Congress could act unilaterally toward Indian lands and reservations, the only relevant inquiry became Congressional intent. This prevailed in *Rosebud* where the Congressional action under discussion was the ratification of an agreement with the Indians. It is significant to our problem that the Court in *Rosebud* held that a beneficial interest retained in the lands opened does not preserve to the reservation its original size and shape.

The guiding consideration in *Rosebud* is, of course, the determination of Congressional intent. The Court said this in *Rosebud:*

> "In all cases, 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be

examined with an eye toward determining what congressional intent was."

Before turning to the application of these considerations, it is important to note one feature of the *Rosebud* analysis. In *Mattz v. Arnett,* as discussed above, the Court rejected the contention that bills passed in one House of Congress but not the other, could be an indicator of Congressional intent. *Rosebud* gives a contrary signal as Congress had failed to ratify a 1901 agreement which would have disestablished the reservation but ratified a similar agreement in 1904. The Court observed that the 1901 agreement would unquestionably have changed the reservation boundaries had it been ratified. The 1904 ratification the Court stated evinced a continuity of purpose and language with the 1901 attempt. Therefore, the 1901 agreement even though not ratified demonstrated "an unmistakable baseline purpose of disestablishment." *Rosebud,* 430 U.S. at 592, 97 S.Ct. at 1366. This line of reasoning modifies *Mattz* in explaining techniques of determining Congressional intent. Under *Rosebud,* if the language of an rlier bill is sufficiently unequivocal, and a later Act can be shown to have accomplished the intended purpose of the first, then the first gains validity as an indicator of Congressional intent even though it did not pass both Houses. This analysis has important application in the case at bar.

In *Rosebud,* as in *DeCoteau,* the assumption of state jurisdiction for many years before the suit arose was clear. All the same, the Court does not rely heavily on that history, but mentions it only after having arrived at a conclusion of disestablishment on the basis of legislative history and statutory construction.

It is clear from the above cases that the controlling factors are, of course, terms of the Act with legislative intent, but we are cautioned against relying on particular statutory language. However, a phrase such as "vacated and restored to the public domain" seems to be a sufficient



though not a necessary factor in disestablishment. *Compare DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), with *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). *DeCoteau* implies that language restoring the reservation to the "public domain" may be enough to constitute disestablishment. The subsequent legislative and administrative history is sometimes used to support an interpretation of an Act. Finally, considerations of jurisdictional history and contemporary opinion on reservation status seem to be relied upon only where they are unequivocal. More often, they are discussed to demonstrate that they are not necessarily contrary to the conclusion already reached on the basis of statutory language and history.

In determining legislative intent it is necessary to consider the legislation in its historical context and not as if it were passed today. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). *Mattz* refers to the "surrounding circumstances." Thus a study of the purpose of any legislation involving the Indians would be incomplete and inaccurate without a consideration of the then prevailing policy on the subject. It is apparent that such policy does not follow an unwavering line, and may not appear in a very obvious way. However, in the case before us there was a very clear and drastic policy change which was put into operation throughout the West in all the larger Indian reservations. This was the General Allotment Act of 1887, 24 Stat. 390. This expressed the policy of replacing the reservations with allotments of a tract of land to each Indian to be owned individually. This was known at the Dawes Act and was introduced by Senator Dawes of Massachusetts. He had been active in groups seeking to improve the life of the Indians.

The Secretary of Interior commented when it was pending as a bill and said in part that it would:

"inspire the Indians with a feeling of assurance as to the permanency of their ownership of the lands they occupy and cultivate; it will give them a clear and legal standing as landed proprietors in the courts of law; it will secure to them for the first time fixed homes under the protection of the same law under which white men hold theirs; it will eventually open to settlement by white men the large tracts of land now belonging to the reservations but not used by the Indians. It will thus put the relations between the Indians and their white neighbors in the Western country upon a new basis, by gradually doing away with the system of large reservations, which has so frequently provoked those encroachments which in the past have led to so much cruel injustice and so many disastrous collisions."

Report of the Secretary of the Interior, 1880, in serial 1959, pp. 5-6, 12.

Senator Dawes understood the Act to have as its goal the abolition of the reservation system. In addressing the Fifth Annual Meeting of the Lake Mohawk Conference of the Friends of the Indian, Senator Dawes stated:

> "Suppose these Indians become citizens of the United States with this 160 acres of land to their sole use, what becomes of the Indian Reservations, what becomes of the Indian Bureau, what becomes of all this machinery, what becomes of the six commissioners appointed for life? Their occupation is gone; they have all vanished, the work for which they have been created . . . is all gone. . . . You are not mending this fabric, you are taking it down stone by stone. . . ."

Minutes of the Lake Mohawk Conference, 1887, pp. 12-13.

Thus in the period between 1897 and 1905 when legislation opening the Uncompahgre and Uintah reservations



was passed, the policy embodied by the Dawes Act was in full force and being implemented. "Friends of the Indians" wished to abolish the reservations out of a genuine conviction that such an abolition would contribute to the Indians' welfare. Concurrently with Senator Dawes but separately there were present in a myriad of forms the forces of expansion always seeking the development of the West and especially seeking more land in the West. These forces were likewise effective in Congress at the time here concerned.

We cannot be here influenced by what Congress might have done. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). We must instead decide what Congress in fact did. "[O]ur task here is a narrow one. . . .[We] cannot remake history." *DeCoteau v. District County Court,* 420 U.S. 425, at 449, 95 S.Ct. 1082, at 1095, 43 L.Ed.2d 300 (1975).

The Utes argue that the original Uintah and Uncompahgre reservations exist to their original extent except as to a few relatively small tracts. The two reservations when created contained some 4,000,000 acres. In 1905, when Congress was considering legislation concerning the reservations, there were about 1,440 Utes in the three bands. There are now about 1,500 enrolled members of the tribe. Nearly all of these live on the trust lands (that is on allotments and tracts reserved for tribal use). Federal programs and services appear to be available to all regardless of the outcome of this case.

Under the decision of the trial court the non-Indian towns of Duchesne and Roosevelt are within what were considered to be the reservation boundaries. About 90 percent of the population of a reservation so constituted would live in these towns. Most of the lands opened for settlement are in Duchesne County. About 300 Indians live there, but all are not members of the tribe. No one challenges the Indians' claim to the tracts for grazing set apart

for the Indians and, of course, to the allotments made to individual Indians (about 360,000 acres) nor to the lands restored in the 1940's to the Indians (some 217,000 acres) nor to the Hill Creek Extension of about 500,000 acres. The basic dispute is to the non-Indian owned portions of the original reservations, and the National Forest portion.

Before the present dispute the trust land, the reserves and the allotments were referred to as the "Ute reservation" or the "Uintah reservation," and this explains the occasional use of the terms when additions were made extending the reservation or extending the reservation boundaries.

## I. THE UNCOMPAHGRE RESERVATION

The Uncompahgre reservation when established contained about 3,000 square miles and was apparently never occupied by more than several hundred Utes at any time. Most of them by 1905 had moved to the Uintah reservation, and they had taken allotments on that reservation rather than on the Uncompahgre.

In determining the status of the Uncompahgre reservation I am chiefly concerned with two pieces of legislation. The first is part of the Indian Appropriations Act of 1894, which contains this language:

> "Sec. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the territory of Utah, agricultural and grazing lands. . . . Said commissioners shall . . . report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.



> . . . .
> "Sec. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress."

Act of August 15, 1894, ch. 20, 28 Stat. 286, 337-338.

This Act directs the Secretary to immediately open the unallotted lands, after approval of the allotments to entry. The land reported as unsuitable shall "thereupon" be restored to public domain by proclamation. The use of the then universally recognized term "public domain" in designating the eventual status of the land is of critical importance. The status of "public domain" there demonstrates an intent to disestablish. *See DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). Land to be in the "public domain" is inconsistent with reservation status or any particular use status. When public land is designated to be used for a particular purpose the land no longer remains in the "public domain." *Scott v. Carew,* 196 U.S. 100, 25 S.Ct. 193, 49 L.Ed. 403 (1905); *Wilcox v. Jackson,* 13 Pet. 498, 10 L.Ed. 264 (1839). Thus the creation of an Indian reservation or a forest or other particular use from public land removes it from the public domain. *Missouri, Kansas and Texas Ry. Co. v. Roberts,* 152 U.S. 114, 14 S.Ct. 496, 38 L.Ed. 377 (1894); *Leav-*

*enworth, Lawrence and Galveston Railroad Co. v. United States,* 92 U.S. 733, 2 Otto 733, 23 L.Ed. 634 (1875). The "public domain" is a well-recognized description of the status of the land. It was probably more generally recognized at the time the acts in issue were passed than it is now. It is clear that the creation of an Indian reservation from "public lands" removes the subject lands from the public domain. The return of particular use lands to the public domain involves similar land status concepts, and "public domain" then must have the same meaning as it did before. In *DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), the Court held that public domain status and reservation status are mutually exclusive.

Another feature of the 1894 Act is the presence of limitations on "entry" when the land is opened. The Tribe argues with respect to the Uintah reservation that limitations on entry demonstrate that Congress did not intend full public domain status for the land. The opening of the Uncompahgre reservation disproves this theory both in the 1894 Act and in the legislative history of that Act. On the face of the 1894 Act the term "public domain" appears simultaneously with provisions limiting entry. Clearly, Congress did not consider these two things to be inconsistent. The legislative history shows that the purpose of the limitation to homestead and townsite entry was not to permit the Indians to retain control of the land, but was to prevent land speculation. Congress gave a great deal of time and care to trying to prevent the land from being snapped up by speculators. 53 Cong.Rec. 7684 (1894); 53 Cong.Rec. 7258-59 (1894). At no time during these debates was there any discussion to suggest a continuing claim by the Indians. Rather the House debated whether the Indians would be required to pay for their allotted lands, implying that Indian title to the reservation was not secure even in 1894 without some payment. 53 Cong. Rec. 7258 (1894). The proper analysis is that once land has been again placed in



the public domain it is open and free to the application of the public land laws. Congress may then make limitations on entry and location, but these do not change the status of the land.

A final note about the 1894 Act is that it provides that the commission appointed to allot to the Uncompahgres should also attempt to procure the agreement of the Uintah Indians to the relinquishment of their land. Thus as early as 1894, Congress contemplated the allotment and opening of the Uintah reservation. It is difficult to escape the impression that Congress hoped and sought to have allotments made to all the Indians as individuals, and to open the land in the reservations not so allotted under the public land laws.

Thus the 1894 Act, although it did not accomplish the opening of the reservation, persuasively indicates by the use of the term "public domain" that it was Congress' intent to remove this land from the Indian reservation. The power of this phrase is not weakened by any limitations on methods of entry to the land. I therefore conclude that this piece of legislation may be sufficient to demonstrate a "baseline" purpose to disestablish that later legislation carried through. The commission appointed by the 1894 Act failed in its efforts to make allotments to the Uncompahgres and was disbanded in 1896.

In 1897, Congress enacted a provision which made the allotment and opening of the Uncompahgre reservation mandatory. Thus:

> "The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompagre Ute Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah Reservation or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncom-

pahgre Utes shall, on or after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States, excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances."

Act of June 7, 1897, ch. 3, 30 Stat. 62, 87.

The analogy to *Rosebud* which I have pursued here is not exact. The 1894 Act was in fact passed by both Houses of Congress, but its execution was not accomplished as we have seen. As an instrument of disestablishment it did not itself mandate the *actual opening* of the reservation, but the lands were to be restored to the public domain. When the lands became public domain they thereby were available under the public land laws to entry and location in the usual manner for all public lands. The "opening" and details for making entries were included in other acts to provide some organization to the expected rush to make entries. Thus the drawings here and at *Rosebud* were provided much like the simultaneous filings of today. Several hundred thousand people appeared for the Sioux drawings.

As the trial court observed, legislative and administrative history supports the conclusion that the Uncompahgre reservation was disestablished. The commission attempted to make allotments *after* the opening date of the 1897 Act as if the land was on a reservation. The Commissioner of Indian Affairs was unsure of the legality of this, as the lands were now in the "public domain." Rept. of the Comm. of Ind.Aff., 1898, JX 108, in H.Doc. No. 5, 55th Cong. 3d Sess. In the next few years, there were concerns that even these allotments might fail, and the Indian agent suggested that these Indians abandon the lands for lands on the Uintah reservation. *See* Letter from Acting Agent Mercer to Comm. of Ind.Aff. of Sept. 9, 1903, JX 174; Letter from Agency Clerk to the Agent of Aug. 31, 1903, JX 173; Letter from the Comm. of Ind.Aff. to Acting



Agent Mercer of July 28, 1903, JX 170. Finally, by 1929, the Bureau of Indian Affairs seems clearly to have taken the position that the Uncompahgre reservation no longer existed. *See* Statement Concerning the Uncompahgre Grazing Reserve, Feb. 6, 1943, JX 451; Memorandum Relating to the Proposed Withdrawal of Certain Lands for Uncompahgre Ute Indians, Office of Indian Affairs, 1931, JX 426.

A final point illustrates both that "public domain" language was intended to apply through the 1897 Act to the Uncompahgres and that Congress, at least to some extent, considered the Uncompahgres and the Uintahs together when making law concerning the Indian reservation in Southern Utah. In the 1897 Act, it is expressly provided that the Uncompahgres may be given allotments on Uintah land. In 1902, in dealing with the Uintah reservation Congress again explicitly provided that the Uncompahgres be given allotments on Uintah land. 32 Stat. 245. This 1902 Uintah Act also contained "public domain" language. I do not rely on these connections, but they do provide some indicators of Congressional actions and intentions with regard to the Ute Tribe.

I understand Congress to have intended, and did disestablish the Uncompahgre reservation as concluded by the trial court.

## II. THE UINTAH RESERVATION

An Indian reservation was established by President Lincoln in 1861 to encompass the entire valley of the Uintah River within the Utah Territory. This was at the time the Government was attempting to have the Utes of Colorado and New Mexico and others settle in designated areas. The reservation was thus for any Indian. Congress confirmed the reservation in 1864 (13 Stat. 63). This in part said:

"Sec. 2. *And be it further enacted,* That the superintendent of Indian affairs for the territory of Utah

be, and he is hereby, authorized and required to collect and settle all or so many of the Indians of said territory as may be found practicable in the Uinta valley, in said territory, which is hereby set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." (Emphasis in original.)

The reservation contained about 3,186 square miles or 2,039,040 acres, and may have been established for many more Indians than those who "were induced to inhabit the same."

In the half century following the establishment of the reservation Congress enacted several laws which the counties and cities claim altered substantially the status of the lands initially encompassed within it. The Utes claim the entire reservation as initially created save for two small diminishments, and claim that the legislation did not affect their rights. The counties and cities claim that the legislation enacted between 1888 and 1905 diminished the original reservation by withdrawing acreage on several occasions: to enable mining in the area known as the Gilsonite Strip; to enlarge the Uintah National Forest; and to create an irrigation project along the Strawberry River. The counties and cities also claim that the Acts of Congress in 1902 and in 1905 directed that allotments of lands in the reservation be made to individual Indians and provided that all lands not allotted were restored to the public domain, and thereby were no longer a part of the reservation.

*The Gilsonite Strip Withdrawal*

The first of the Acts of Congress was directed to a 7,000-acre tract in the reservation. In 1886 a prospector had located mining claims on the Uintah reservation for the mineral gilsonite. The land in question was not then



being used by the Indians for agricultural or grazing purposes. Congress in 1888 passes an Act which mandated that the 7,040-acre "Gilsonite Strip" be "declared to be public lands of the United States and restored to the public domain." Act of May 24, 1888, ch. 310, 25 Stat. 157. The Act directed the Secretary of the Interior to procure the approval of a three-fourths majority of the adult male Indians, and to sell the land. Approval was secured and some sales made. The proceeds were credited to the Utes. The trial court found, and the parties do not dispute on appeal, that the Gilsonite Strip was removed from the reservation. I agree with this conclusion. The 1888 Act contained a significant restriction on the manner of entry after the lands were restored to the public domain. Thus the lands were to be sold in lots not exceeding one-quarter section in size. The parties do not dispute that this limitation on the manner of the disposition did not affect its removal from the reservation and restored it to the "public domain."

*Unallotted Lands*

During the 1890's and thereafter there was increasing pressure on Congress and the President to open parts of most of the large Indian reservations in the West to settlement by non-Indians, and also to have the Indians own individual tracts of land for their own betterment. I have mentioned these two movements in this opinion. The literature of the time and the court opinions refer to these as the "familiar forces."

The familiar forces thus sought to remove parts of the Uintah Valley reservation from reservation status and so to permit individual ownership by the Indians and to open it for settlement and mining. Thus in this context, with the recognized policy evidenced by the General Allotment Act, and the opening of other reservations, the Uintah Valley reservation was not an isolated instance where the "familiar forces" brought about changes. The people seek-

ing the changes as a betterment for the Indians were sincere in their views. Many public figures advocated individual ownership by Indians, as indeed did a majority in the Congress and the President. The General Allotment Act must be taken as one example and is a clear and definite expression of the policy. Directions to carry it out were included in many pieces of legislation. This was the dominant feeling and policy of the time, the time when the legislation herein considered was passed. Its intent and purpose must be determined in that context, and not as the policies may now exist. Thus Congress in 1888 (25 Stat. 157) declared that a described portion of the Uintah Valley reservation "is hereby declared to be public lands of the United States and restored to the public domain." The Act provided that the restoration be effective upon ratification by three-fourths of the Indians on the reservation. This ratification was not obtained.

Congress also had commissions appointed to negotiate allotments and cessions of the Uncompahgre and Uintah reservation in 1894, 1897 and 1898.

Then on May 27, 1902 Congress included as part of the Indian appropriations bill a direction that allotments be made to all adult White River and Uintah Utes. This included a provision restoring any unallotted lands of the 1864 Uintah reservation to the "public domain." Act of May 27, 1902, 32 Stat. 245, 263. The provision, in pertinent part, is as follows:

> "That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three,



> on which date all the unallotted lands within said reservation shall be restored to the public domain."

The term "public domain" was used twice more in the later portions of the Act. This was one of several connected acts about which this dispute is centered and the references to "public domain" status for the lands not allotted to individual Indians are very significant to the arguments of the parties and to the position taken by the trial court. Congress thereafter used appropriation acts in 1903, 1904 and 1905 to extend the time for opening and to insert added provisions. This was a series of acts with no express words of amendment and with express repeal of relatively small elements in the prior acts.

The trial court reasoned that the Supreme Court's holding in *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), compelled a finding that the language of the 1902 Act providing that all of the unallotted lands "shall be restored to the public domain" would have disestablished the reservation had the unallotted lands then been opened for settlement. The trial court reasoned, however, that this 1902 Act was so changed by a 1905 enactment that such a result did not come about.

The Utes attempt to distinguish *Seymour* by arguing that this 1902 Act may restore the unallotted lands to the public domain, but there is also needed a provision that the lands be vacated by the tribe before the lands are restored to the public domain. They argue that the cases uniformly provide that *independent* language to indicate that the reservation boundaries would be extinguished or adjusted at the same time that public entry was allowed is necessary to disestablish. They cite *DeCoteau v. District County Court,* 420 U.S. 425, 445-46, 95 S.Ct. 1082, 1093-94, 43 L.Ed.2d 300 (1975) (the express language of cession and relinquishment of reservation lands restored them to the public domain); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) (Act of March

2, 1889, § 21, 25 Stat. 896, created six separate reservations from the Great Sioux reservation and "all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain," 25 Stat. at 896); *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) ("vacated and restored to the public domain"); *Starr v. Long Jim,* 227 U.S. 613, 33 S.Ct. 358, 57 L.Ed. 670 (1913) (Secretary of the Interior to cause the quantity of land allowed Indians remaining on the reservation to be selected in as compact a form as possible, the remainder to be restored to the public domain, Act of July 4, 1884, 23 Stat. 76); *Russ v. Wilkins,* 624 F.2d 914 (9th Cir. 1980) (explicit description of new reservation boundaries, the remainder "restored to the public lands of the United States," 17 Stat. at 634). These cited cases, as indicated by the notes, are however a mixture of statutory provisions, and do not stand for a proposition that a provision vacating the reservation or describing new boundaries is required for disestablishment.

The argument that the operative language of restoration must contain independent language adjusting or extinguishing reservation boundaries is unpersuasive. The Supreme Court has never mentioned such a requirement, *see, e.g., Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), and I see no reason to impose one now. The trial court was correct in determining that the 1902 Act would have accomplished the disestablishment of the reservation as to unallotted lands had the lands been then opened. An additional factor relative to the 1902 Act was an addition to it providing for a tract of grazing land to be set apart for the common use of the Indians to meet the reasonable need of the Indians. This provision was added by a joint resolution on June 19, 1902 (32 Stat. 744). It in part provided:



> "In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock."

This addition is significant in evaluating the 1902 Act and further demonstrates the status of the reservation lands before the opening.

*After the 1902 Act*

The Indian consent required by the 1902 Act was not forthcoming within the time limit to make the allotments, and Congress had to take further action. However, the matter was influenced in a very substantial way by the decision of the Supreme Court in *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903), decided January 5, 1903. The Court there held that Congress could unilaterally change Indian reservations; that no tribal or Indian consent was required; and that there was no contractual relationship between the Government and the tribe arising from the establishment of a reservation. As is apparent, this had significant implications on what Congress was trying to accomplish as to this reservation and as to others.

In another appropriation act Congress by the Act of March 3, 1903 (32 Stat. 982) again extended the time for opening the unallotted lands for entry as provided in the 1902 Act, and eliminated any reference to consent of the Indians.

In 1904, Congress again extended in an appropriation act the time for the opening to March 10, 1905 so that surveying could be completed and allotments made. Act of April 21, 1904, 33 Stat. 189, 207.

The trial court held, and the parties do not dispute on appeal, that the 1903 and 1904 Acts did not affect the operative terms of the 1902 Act. I agree.

The time set by the 1904 Act for allotments to be completed (March 10, 1905) was running out and Congress again used an appropriation act to extend the time. However, there were added this time some new provisions by this Act of March 3, 1905 (33 Stat. 1048). There were provided more details as to the opening of the unallotted lands for entry, and restrictions were added as well which were of significance.

This 1905 Act in part provided:

"That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof;

"That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he



considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided,* That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation." (Emphasis in original.)

### *The Relationship of the 1902 and 1905 Acts*

This court considered the relationship of the various enactments concerning the Uintah reservation and certain issues regarding the status of the unallotted lands in *Hanson v. United States,* 153 F.2d 162 (10th Cir.). We there concluded that the issue had to be decided under the 1902 Act, and that the 1905 Act merely extended the date of opening of the reservation and did not affect the operative terms of the 1902 Act.

What is advanced as "limitations" on disposition in the 1905 Act is the provision that the unallotted lands were to be disposed of under "the general provisions of the homestead and town-site laws, . . . and shall be opened to settlement and entry by proclamation of the President." The 1905 Act does not specifically utilize or repeat the "public domain" language of the 1902 Act.

The provision that the lands be opened under the homestead and townsite laws does not constitute a substantial restriction which militates against the conclusion that the public domain intent in the 1902 Act was carried over into the 1905 Act. The limitation in the *Rosebud* opening is comparable as is *Starr v. Long Jim,* 227 U.S. 613, 33 S.Ct. 358, 57 L.Ed. 670 (1913). The provisions considered

in *Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973), and in *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), do not lead to a contrary conclusion. In the case before us the provisions in the prior acts dictated the public domain conclusion under the 1905 Act.

Nothing in the Congressional debates suggests an attempt to change the 1902 intent. *See* 39 Cong.Rec. 1181-85, January 21, 1905. Rather, Congress was concerned in 1905 with the possibility that land speculators would deprive actual homeseekers of the choicest land. "Indian Appropriations Bill, 1906," Hearings, Subcomm. of the Sen. Comm. of Ind. Aff., 58th Cong., 3d Sess. (1905).

The intent of the 1905 Act was thus to effect the restoration of the unallotted lands to the public domain and to allow entry under the homestead and townsite laws to prevent speculation.

Evidence of this intent can be found in the Committee Report to S. 6867 in 1905, a bill which used language virtually identical to that found in the 1905 Act. There the report included letters from the Commissioner of Indian Affairs and from the Commissioner of the General Land Office which referred to the lands as being in the public domain or as public lands. S.Rep. No. 4240, 58th Cong., 3d Sess. (1905).

It is difficult to accept the argument that limitations on the manner of entry necessarily vitiate Congressional intent to disestablish the reservation in view of the Gilsonite Strip withdrawal herein considered. There, some 7,000 acres were restored to the public domain subject to a limitation on disposition to purchase with a maximum number of acres. As I have noted, neither party disputes that the strip was removed from reservation status. Thus limitations on entry are not necessarily inconsistent with the disestablishment. As mentioned in the *Rosebud* opinion



Congress knew what operative words were needed to accomplish the purpose.

As mentioned, the changes were accomplished by a series of provisions contained in Indian appropriation acts of 1902, 1903, 1904 and 1905. Each act built on the ones before, and especially by "extending" the time for opening from those provided before. This shows a continuous process brought about by the delays encountered on the ground. The acts also did not seek to expressly amend the prior act but, as mentioned, built on the one before. This prevails as to matters other than time "extentions." There were several express repeals, but only as to specific elements which were not of significance. Thus there were no general repeals but only additions of items here of concern. This cumulative series of enactments should be compared to the position taken by the Supreme Court in *Rosebud,* as I have already mentioned. There an agreement that failed to be ratified by Congress in 1901 could be considered in determining the intent of a 1904 Act. The 1904 Act or agreement indicated continuity of purpose and language with the 1901 attempt. The 1901 agreement showed "an unmistakable baseline purpose of disestablishment." *Rosebud,* at 592, 97 S.Ct. at 1366. This same demonstration of continuity is present in the case before us and the 1902 Act does also show a "baseline purpose of disestablishment." Again, the persuasiveness is greater here because the earlier language was in acts that passed both Houses and not in bills that failed.

Even if it were not clear from the terms of the 1905 Act and its legislative history that the 1905 Act was not intended to affect the substantive terms of the 1902 Act, 39 Cong.Rec. 3868, 3919, 39 Cong.Rec. 1181-83, the contemporaneous and subsequent legislative and administrative treatment of the unallotted lands confirms that they were part of the public domain.

The most important indication of the effect of the 1905 Act is President Roosevelt's Proclamation of July 14, 1905 which stated, in relevant part:

> "Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, 'shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre'.
>
> "And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:
>
> . . . .
>
> "Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States. . . ."

Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3119.



The lands were to be opened by a presidential proclamation, and of great significance in any determination of the intent of Congress is the executive implementation of the legislation. The proclamation is very similar in all significant respects to the *Rosebud* proclamation. This proclamation, with its references and adoption of terms from the 1902 Act, in my view demonstrates the continuation of the 1902 provisions, and confirms the public domain status of the unallotted lands. The proclamation is "an unambiguous, contemporaneous, statement, by the Nation's Chief Executive, of a perceived disestablishment" of the reservation. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. at 602-03, 97 S.Ct. at 1371-72.

A further indication that the unallotted lands were no longer part of the reservation after it was opened is the subsequent restoration of some of those lands to reservation status for the Utes. Much if not all of the unallotted lands on the original Uintah reservation which had not been disposed of under the public land laws were restored in 1945. The Order of Restoration recites that "pursuant to the provisions of the act of May 27, 1902 (32 Stat. 263)" the unallotted lands were made subject to disposal under the laws applying to public lands. As indicated this restoration acknowledges that the opening was under the 1902 Act. Section 3 of the Reorganization Act provides that the Secretary of the Interior is authorized "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened." Act of June 18, 1934, 73rd Cong., 2d Sess., § 3. Neither party disputes that the restorations accomplished pursuant to § 463 of 25 U.S.C. made them part of the reservation. I agree. This restoration included about 217,000 acres.

Much later administrative treatment of the unallotted lands also confirms the proposition that those lands were restored to the public domain. *See, e.g.,* Opinion of the Solicitor of the Department of the Interior, January 27,

1947, 59 I.D. 393 (unallotted lands were "restored to the public domain pursuant to the Act of May 27, 1902, as amended. . . . Although the lands were restored to the public domain, they were subject to disposition only under the Act of May 27, 1902, as amended." *Id.* at 393, 394); Letter from the Commissioner of Indian Affairs to the Secretary of the Interior, June 19, 1941.

The largest single addition occurred in 1948 when Congress added the Hill Creek Extension of some 510,000 acres of the former Uncompahgre reservation to the Uintah and Ouray reservation. Act of March 11, 1948, ch. 108, 62 Stat. 72.

I have also examined the maps introduced by the parties and the governmental statistics setting forth the acreage of the reservation and find them to support the position taken by the counties and cities. Statements made by the Utes themselves also tend to detract from their position. For example, the 1957 Ute Ten Year Development Program provides a description of the total acreage of the Uintah and Ouray reservation as currently containing 1,010,000 acres. In detail, it delineates, "The original area of the Uintah Reservation in Wasatch, Duchesne and Uintah Counties were reduced as follows. . . ." (The document then details the Gilsonite Strip reduction, the 1905 addition to the Uintah Forest Reserve, the Strawberry River reduction, the 1902 grazing reserve and allotments to individual Indians and "[a]pproximately 798,877 acres were disposed of by the United States for cash, or otherwise set aside and taken for its own use at various times since the opening of the reservation in 1905.") The statistics of the Office of Indian Affairs show similar figures.

Both parties have introduced substantial evidence regarding administrative and legislative appellations to the "current" or "former" status of the reservation. My review of those references evinces no discernible Congressional intent one way or the other. There is simply no



consistent, clear and uniform identification of the reservation's status in the subsequent legislative record. Analysis of the newspaper accountings of the events occurring on the reservation is similarly opaque.

Thus, after closely examining the record as it relates to the unallotted lands, I must conclude that the trial court erred in holding that the unallotted lands were not returned to the public domain pursuant to the 1902 Act.

*Other Issues—Pre-opening Withdrawals*
*Forest Reserve Lands*

Besides extending the time of entry under the 1902 Act and describing the entry thereunder, the 1905 Act also provided that before the opening the President was authorized to set apart and reserve lands in the reservation as an addition to the Uintah Forest Reserve. 33 Stat. 1070. Specifically, the Act states:

> "That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest resreves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary. . . ."

By proclamation, President Theodore Roosevelt withdrew 1,010,000 acres from the Uintah reservation for that purpose. Proclamation of July 14, 1905, 34 Stat. pt. 3, 3116. The reserve was created pursuant to specific authority under the 1905 Act and the general authority he already had.

The trial court found that the presidential forest reserve proclamation extinguished those portions of the reservation included therein. On appeal, the Utes argue that the statutory language of the 1905 Act and the contemporaneous legislative history did not extinguish the reservation bound-

aries nor did Congress ever enact subsequent legislation to extinguish the Utes' title. In the proclamation creating the forest reserve out of the reservation lands it was expressly provided that the reserve be an addition to the Uintah Forest Reserve which theretofore existed. The addition was to be "subject to the laws, rules, and regulations governing forest reserves."

My review of the 1905 Act, the presidential proclamation, the pertinent legislative history and the subsequent treatment of the subject lands convinces me that the forest reserve lands are not part of the reservation. No express language of termination of Indian jurisdiction over the Forest Service lands or an express extinguishment of the reservation boundaries was required. As I noted previously the Supreme Court has held that the "clear language of express termination" is not a required talisman for termination or disestablishment. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 588 n. 4, 97 S.Ct. 1361, 1364 n. 4, 51 L.Ed.2d 660 (1977). The authority was present and was exercised to so change the land status from reservation lands to public forest reserves. The administrative authority over the lands was transferred from the Secretary of the Interior to the Secretary of Agriculture pursuant to the Act of February 1, 1905, ch. 288, 33 Stat. 628, and subjected the Forest Service lands to an entirely different regulatory regime. By transferring of reservation status to the status of the Forest Service lands thus for public use and by shifting the administrative authority over them, Congressional intent to remove the lands from the reservation is clearly evidenced.

My view that Indian jurisdiction is inconsistent with the land's status as forest reserve land is consonant with recent holdings by the Court of Claims and the Ninth Circuit. Both courts held that the designation of land as a forest reserve is itself effective to extinguish Indian title. *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 1386, 1391-93, 206 Ct.Cl. 649 (1975); *United States v. Gemmill,*



535 F.2d 1145 (9th Cir. 1976). The Ninth Circuit went on to find that "any ambiguity about extinguishment that may have remained after the establishment of the forest reserves, has been decisively resolved by congressional payment of compensation to the . . . Indians for these lands." *Id.* at 1149. The Utes received $1,217,000.00 in compensation. The situation before us is very similar as Congress added to a forest reserve by removing lands from an Indian reservation and later compensating the Indians for the lands. The trial court was correct in finding that the 1,010,000 acres withdrawn pursuant to the July 14, 1905 presidential proclamation were no longer part of the Uintah reservation.

*The Strawberry River Reclamation*

The third major part of the 1905 Act authorized the President before the reservation was opened to "set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development." President Roosevelt withheld from disposal 56,000 acres along the Strawberry River for reclamation purposes pursuant to that authority in August 1905. Presidential Proclamation of August 3, 1905, 34 Stat. pt. 3, 3141.

Five years later, Congress compensated the Utes for the Strawberry River lands and clearly extinguished any Indian interest in the lands by providing that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished, and the title, management and control thereof shall pass to the owners of the lands irrigated from said project. . . ." Act of April 4, 1910, 36 Stat. 269, 285.

Neither side disputes the trial court's holding that the reservation was diminished to the extent of the 56,000-acre Strawberry River withdrawal.

The withdrawal of lands for the Strawberry River irrigation project does not give rise to any implication that the unallotted lands remained part of the reservation. The Strawberry River lands were set apart and reserved on August 3, 1905, over three weeks *prior* to the opening of the reservation on August 28, 1905. Affirmative action to remove the Strawberry River lands from the reservation was then necessary because the reservation had not yet been opened. The Strawberry River withdrawal has no bearing on the status of lands which were subsequently to be opened to the public domain.

I must repeat that these issues must be considered in the context of the aims of Congress at the time the legislation was enacted, and what was *then* sought to be accomplished. It is easy to apply later views and policies, but this should not be done. The then prevailing aims and purposes are well documented in the legislative history, and we should not now seek to apply current standards. Also, the application of then established public land law and the prevailing use and meaning of its terms are essential.

## CONCLUSION

I would:

1. Affirm the trial court's holding that the original Uncompahgre reservation was disestablished by Congress pursuant to the Act of June 7, 1897 and no longer exists.

2. Affirm the trial court's holding that prior to August 28, 1905, the original boundaries of the Uintah Valley Indian reservation were diminished by Congress through the withdrawal of the Gilsonite Strip in 1888, by the withdrawal of 1,010,000 acres subsequently made part of the Uintah National Forest, and by the withdrawal of approximately 56,000 acres for the Strawberry River irrigation project.



3. Affirm the trial court's finding that the 510,000-acre Hill Creek Extension was incorporated within the Uintah and Ouray Indian reservation.

As to the Uintah Valley reservation, I would reverse the holding of the trial court that the unallotted lands at the opening remained part of the reservation. Instead it is my view that the then unallotted lands lost all reservation status, became part of the public domain, and were not within the reservation for any purpose when the reservation was opened, subject only to the special tracts herein discussed set apart for specific uses before the land was opened, and subject to valid mineral claims specifically provided for in the Acts of 1902, 1903, 1904 and 1905 and valid claims made under the general mining laws.

BARRETT, Circuit Judge, joins in this dissenting opinion.

United States of all the lands within said reservation not allotted or needed for allotment as aforesaid. The agreement for such cession shall be reported by said commission and become operative when ratified by Act of Congress; and thereupon such ceded lands shall be held in trust by the United States for the purpose of sale to citizens thereof: *Provided*, That the United States shall pay no sum or amount whatever for said lands so ceded. Said lands shall be sold in such manner and in such quantities and for such prices as may be determined by Congress: *Provided*, That the amounts so received shall, in the aggregate be sufficient to pay said Indians in full the amount agreed upon for said lands. All sums received from the sales of said lands shall be placed in the Treasury of the United States for said Indians, and shall be exclusively devoted to the use and benefit of the Indians having interests in the lands so ceded.

—ratification, etc.

Provisos. Payment. Sale.

Aggregate amount from sales, etc.

SEC. 3. That said commissioners shall receive six dollars per day each, and their actual and necessary traveling and incidental expenses while on duty, and to be allowed a clerk to be selected by them, whose compensation shall be fixed by said commissioners, subject to the approval of the Secretary of the Interior: *Provided*, That the cost of executing the provisions of this Act shall not exceed the sum of five thousand dollars, which sum is hereby appropriated for that purpose, out of any moneys in the Treasury not otherwise appropriated.

Pay of commissioners. —clerk.

Proviso. Limit for expenses, etc.

~~Approved, June 4, 1898.~~

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**9. Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-264, I Kapp. 750, 753 (2d ed. 1904), LD 82:**

That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of

Uintah and White River Utes.

Allotment of irrigable land.
*Post*, pp. 744, 997.

the Uintah and the White River tribes of Ute Indians, be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further*, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys

Unallotted lands restored to public domain.
*Provisos.*
Homestead entries.
Mineral leases.

Raven Mining Company.

Application of proceeds from sales.

*Post*, p. 745.



in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

Said item of seventy thousand and sixty-four dollars and forty-eight cents to be paid to the Uintah and White River Utes covers claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and for which the Government has received from said Uncompahgre Indians money aggregating sixty thousand and sixty-four dollars and forty-eight cents; and the remaining ten thousand dollars claimed by the Indians under an Act of Congress detaching a small part of the reservation on the east and under which Act the proceeds of the sale of the lands were to be applied for the benefit of the Indians.

Payments to Indians.
Vol. 30, p. 87.
*Post*, p. 744.

* * * *

**10. Joint Resolution of June 19, 1902, No. 31, 32 Stat. 744, I Kapp. 799-800 (2d ed. 1904), LD 85:**

June 19, 1902.
[Pub. Res., No. 31.]

[No. 31.] Joint Resolution Supplementing and modifying certain provisions of the Indian appropriation Act for the year ending June thirtieth, nineteen hundred and three.

Indian appropriation act.
Corrections.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions of the Act "Making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, and for other

purposes," are hereby supplemented and modified as follows:

Spokane Indian Reservation, Wash.

The Secretary of the Interior is directed to make allotments in severalty to the Indians of the Spokane Indian Reservation in the State of Washington, and upon the completion of such allotments the President shall by proclamation give public notice thereof, whereupon the lands in said reservation not allotted to Indians or used or reserved by the Government, or occupied for school purposes, shall be opened to exploration, location, occupation, and purchase under the mining laws.

Land not allotted open to purchase, etc.
*Ante*, p. 266.

Walker River Indian Reservation.

Nonirrigable grazing lands.
*Ante*, p. 260.

In addition to the allotment in severalty of lands in the Walker River Indian Reservation in the State of Nevada, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

Uintah and White River Utes.

Nonirrigable grazing lands.
*Ante*, p. 263.
*Post*, p. 997.

In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

Uncompahgre Indians.

Allotments confirmed to agricultural lands.

All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to



each head of a family and forty acres to each other Indian, and no more. The grazing land selected and set apart as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named.

Grazing lands.
*Ante*, p. 264.

Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

Allotments in severalty to Indians outside Indian Territory.
Vol. 24, p. 388.
*Ante*, p. 260.

The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

Approved, June 19, 1902.

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**11. Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-998, III Kapp. 14, 17-18 (1913), LD 91:**

To enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the pur-

Walker River Indi-

pose of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Walker River Reservation in Nevada, and the Uintah and White River Utes in Utah, and the joint resolution of June nineteenth, nineteen hundred and two, providing for the allotment of the Indians of Spokane Reservation in Washington, to be immediately available, one hundred and seventy-five thousand dollars: *Provided, however,* That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act: *And provided further,* That the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not exceed two hundred and fifty thousand acres: *And provided further,* That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May twenty-seventh, nineteen hundred and two, be, and the same is hereby, extended to October first, nineteen hundred and four.

ans, Nev.
Uintah and White River Utes, Utah.
Survey, etc., of irrigable lands.
32 Stat., 260, 742.
Vol 1, p. 751, 799.

32 Stat., 998.

Proviso.
Obtaining consent to allotment.
1904, ch. 1403, 33 Stat., 207, post, p. 53.

Grazing lands.
Restriction.
1905, ch. 1479, 33 Stat., 1069, post, p. 146.

Unallotted lands.
Time of opening in settlement extended.
32 Stat., 251, vol. 1, p. 732.



That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, or other like substances, which were reserved from location, and entry by provision in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June seventh, eighteen hundred and ninety-seven, all discoveries and locations of any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in the office of the county recorder of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral land laws, provided that the owners of such locations shall relocate their respective claims and record the same in the office of the county recorder of Uintah County, Utah, within ninety days after the passage of this act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms and with such restrictions as may be prescribed

Uncompahgre Indian Reservation.

Mining claims located on, prior to January 1, 1891, valid.

30 Stat., 87, vol. 1; p. 621.

Patents to issue on relocations, etc., of claims.

Claims located after January 1, 1891, invalid.

Sale of remainder of mineral lands.

Restrictions.

in a proclamation of the President of the United States issued for that purpose not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress.

Balance of lands reserved.

* * * *

**12.Act of April 21, 1904, Ch. 1402, 33 Stat. 189, 207-208, III Kapp. 35, 53 (1913), LD 94:**

Uintah Reservation, Utah.
Time of opening unallotted lands extended.
1902, ch. 888, 32 Stat., 263, vol. 1, p. 753.
1903, ch. 994, 32 Stat., 998, ante, p. 18.
1905, ch. 1479, 33 Stat., 1069, post, p. 146.
33 Stat., 208.

That the time for opening the unallotted lands to public entry on the Uintah Reservation, in Utah, as provided by the acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, be, and the same is hereby, extended to March tenth, nineteen hundred and five, and five thousand dollars is hereby appropriated to enable the Secretary of the Interior to do the necessary surveying, and otherwise carry out the purposes of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Uintah and White River Utes in Utah.

* * * *

**13.Act of March 3, 1905, ch. 1479, 33 Stat, 1048, 1069-1070, III Kapp. 124, 146-147 (1913), LD 105:**

Uintah Reservation Utah.

That so much of the act of March third, nineteen hundred and three, as provides that the grazing lands



Restriction on grazing lands repealed.
1902, J.R. 31, 32 Stat., 744, vol. 1, p. 799.
1903, ch. 994, 32 Stat., 998, ante, p. 17.

to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.

Unallotted lands.
Time extended for opening, to entry.
1904, ch. 1402, 33 Stat., 207, ante, p. 53.
1902, ch. 888, 32 Stat., 263, vol. 1, p. 753.

That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act

Provisos.
Soldiers' and sailors' rights.
R. S. secs. 2304, 2305.
33 Stat., 1070.

of March first, nineteen hundred and one, shall not be abridged: *And provided further*, That all lands opened to settlement and entry under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the act of Congress of May twenty-seventh, nineteen hundred and two, and the acts amendatory thereof and supplemental thereto.

Sale of remaining lands.

Proceeds of sale.

1902 ch. 888, 32 Stat., 263, vol. 1, p. 753.

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided*, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.[1]

Uintah Forest Reserve.

Additional land reserved.

32 Stat., 263.

Reservoir site.

Proviso.

Proceeds of timber sales.

That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in the office of the Secretary of the Interior, in

Raven Mining Co.

Certificate of location of claims, etc.



the city of Washington, said description and a map showing the locations made by it on the Uintah Reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two (Statutes at Large, volume thirty-two, page two hundred and sixty-three); and thereupon the Secretary of the Interior shall forthwith cause said locations to be inspected and report made, and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each of said claims: *Provided further*, That the Florence Mining Company entitled under the act of Congress approved May twenty-seventh, nineteen hundred and two, to the preferential right to locate not to exceed six hundred and forty acres of contiguous mineral land in the Uintah Reservation, Utah, shall within sixty days from the passage of this act file in the office of the recorder of deeds of the county in which its location is made a proper description of its claim, and it shall within the same time file in the office of the Secretary of the Interior said description and a map showing the location made by it on the Uintah Reservation, Utah, and thereupon the Secretary of the Interior shall forthwith cause said location to be inspected and report thereon made, and if found not to exceed six hundred and forty acres he shall issue a patent in fee to said company for the said land: *And provided further*, That the extension of time for opening the unallotted lands to public entry herein granted shall not extend the time to make locations to any person or company heretofore given a preferential right, but the Raven Mining Company and the Florence Mining Company pending the time for opening to public entry the Uintah Reservation shall

1902, ch. 888, supra.

Patent to.

Provisos.

Florence Mining Co.

Certificate of locations of claim.

Patent to.

Right of ingress, etc.

have the right of ingress and egress to and from their respective properties over and through said reservation.

* * * *

**14. Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3116, III Kapp. 602 (1913), LD 107:**

July 14, 1905. Proclamations, 34 Stat., Part 3, 3116.

## BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

## A PROCLAMATION.

Uintah Forest Reserve, Utah. Preamble. 29 Stat., 895. 26 Stat., 1103. Proclamations, 34 Stat., pp. 200-201.

WHEREAS, the Uintah Forest Reserve, in the State of Utah, was established by proclamation dated February twenty-second, eighteen hundred and ninety-seven, under and by virtue of section twenty-four of the Act of Congress, approved March third, eighteen hundred and ninety-one, entitled, "An act to repeal timber-culture laws, and for other purposes", which provides, "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof";

33 Stat., Part I, 1070.

And whereas, it is provided by the Act of Congress, approved March third, nineteen hundred and five, entitled, "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes," that "before the opening of the Uintah Indian Reservation the President is hereby authorized to set



apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the Act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary";

And whereas, it is considered necessary for the public good that certain lands in the Uintah Indian Reservation be set apart and reserved as an addition to the Uintah Forest Reserve;

Lands added to forest reserve from Uintah Indian Reservation.

Now, therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power in me vested by the aforesaid act of Congress, approved March third, nineteen hundred and five, do hereby make known and proclaim that certain lands in the said Uintah Indian Reservation are hereby added to and made a part of the Uintah Forest Reserve, and that the boundary lines of the said forest reserve are, accordingly, so changed and extended as to read as follows:

Description.

Beginning at the north-west corner of Township one (1) South, Range seven (7) East, Salt Lake Meridian, Utah; thence easterly along the Base Line to the south-west corner of Township one (1) North, Range nine (9) East; thence northerly to the north-west corner of said township; thence easterly to the south-west corner of Township two (2) North, Range fourteen (14) East; thence northerly to the north-west corner of said township; thence easterly to the middle of the channel of the Green River; thence in a general south-easterly direction along the middle of the channel of said river to the range line between Ranges twenty-two (22) and twenty-three (23) East; thence southerly along the range line, allowing for the proper offset on the Base Line, to the south-east corner of

Township two (2) South, Range twenty-two (22) East; thence westerly to the north-west corner of Township three (3) South, Range nineteen (19) East; thence southerly to the eastern boundary of the Uintah Indian Reservation; thence north-westerly along said Indian reservation boundary to the section line between Sections twenty-one (21) and twenty-eight (28), Township two (2) North, Range one (1) East, Uintah Meridian; thence westerly to the south-west corner of Section nineteen (19), Township two (2) North, Range one (1) West; thence northerly to the south-east corner of Section thirteen (13), Township two (2) North, Range two (2) West; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of Section twelve (12), said township; thence westerly to the south-west corner of Section four (4), said township; thence northerly to the north-west corner of said section; thence westerly to the north-east corner of Section four (4), Township two (2) North, Range three (3) West; thence southerly to the south-east corner of Section thirty-three (33), said township thence westerly to the north-east corner of Township one (1) North, Range six (6) West; thence southerly to the south-east corner of Section thirteen (13) said township; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of said section; thence westerly to the south-west corner of Section eleven (11), said township; thence northerly to the north-west corner of said section; thence westerly to the north-east corner of Section eight (8), said township; thence southerly to the south-east corner of Section seventeen (17), said township; thence westerly to the north-east corner of Section twenty-one (21), Township one (1) North, Range nine (9) West; thence southerly to the south-east corner of said section; thence westerly to the south-west corner of Section nineteen (19), said township; thence southerly along the range line, allowing for the proper offset on the Base Line, to the north-west corner of Section eighteen (18), Township one (1) South, Range nine (9) West; thence easterly to the north-east corner of Section sixteen (16), Township one (1), South, Range eight (8) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence westerly to the north-east corner of Section four (4), Township two (2) South, Range ten (10) West; thence southerly to the south-east corner of Section sixteen (16), said township; thence westerly to the south-west corner of Section eighteen (18), said township; thence southerly to the south-east corner of Township two (2) South, Range eleven (11) West; thence westerly to the south-west corner of Section thirty-three (33), said township; thence northerly to the south-east corner of Section twenty (20), said township; thence westerly to the south-west corner of said section; thence northerly to the south-east corner of Section seven (7), said township; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of said township; thence westerly to the north-east corner of fractional Section four (4), Township two (2) South, Range twelve (12) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence easterly to the north-east corner of Section three (3), Township three (3) South, Range twelve (12) West; thence southerly to the south-east corner of said section; thence easterly to the north-east corner of Section eleven (11), said township; thence southerly to the south-east corner of said section; thence easterly to the north-east corner of Section thirteen (13), said township; thence southerly to the south-east corner of Township four (4) South, Range twelve (12) West; thence easterly to the south-west corner of Section thirty-three (33), Township four (4) South, Range

Uintah Forest Reserve—Continued.

eleven (11) West; thence northerly to the north-west corner of said section; thence easterly to the south-west corner of Section twenty-five (25), said township; thence northerly to the north-west corner of said section; thence easterly to the north-east corner of Section thirty (30), Township four (4) South, Range ten (10) West; thence southerly to the south-east corner of Section thirty-one (31), said township; thence easterly to the southwest corner of Township four (4) South, Range nine (9) West; thence northerly to the north-west corner of Section thirty (30), said township; thence easterly to the north-east corner of Section twenty-five (25), said township; thence southerly to the south-east corner of said township; thence easterly to the north-east corner of Section five (5), Township five (5) South, Range eight (8) West; thence southerly to the south-east corner of Section seventeen (17), said township; thence westerly to the south-west corner of Section eighteen (18), said township; thence southerly to the south-east corner of Section twenty-four (24), Township five (5) South, Range nine (9) West; thence westerly to the north-east corner of Section twenty-eight (28), said township; thence southerly to the south-east corner of said section; thence westerly to the south-west corner of Section twenty-nine (29), said township; thence southerly to the north-west corner of Section twenty-nine (29), Township six (6) South, Range nine (9) West; thence easterly to the south-west corner of Section twenty-one (21), Township six (6) South, Range eight (8) West; thence northerly to the north-west corner of Section four (4), said township; thence easterly to the eastern boundary of the Uintah Indian Reservation; thence in a general south-westerly and north-westerly direction along said Indian reservation boundary to the range line between Ranges six (6) and seven (7) East, Salt Lake Meridian; thence northerly to the north-west corner of Township



one (1) South, Range seven (7) East, the place of beginning; such of the above-named corners as have not been established by the official surveys being intended to be located at the points where such corners would fall in projecting the surveys in the directions indicated without allowing for any irregularities which may occur in actually extending the surveys;

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: *Provided*, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made. Lands excepted.

Warning is hereby expressly given to all persons not to make settlement upon the lands reserved by this proclamation. Reserved from settlement.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth. [SEALED]

By the President: THEODORE ROOSEVELT

ALVEY A. ADEE

*Acting Secretary of State.*

15. Presidential Proclamation of July 14, 1905, 34 Stat., 3119, III Kapp. 605 (1913), LD 108:

## BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.
## A PROCLAMATION.

July 14, 1905.
Proclamations.
34 Stat., Part 3, 3119.
Uintah Indian Reservation, Utah.
Preamble.
32 Stat., 263.

Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre".

And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:

32 Stat., 998.
33 Stat., 207.
33 Stat., 1069.

That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the Act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in



which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: Provided, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish war or Philippine insurrection as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States; and it is further directed and prescribed that:

Unallotted lands on reservation opened to entry, etc., Aug. 28, 1905.

Commencing at 9 o'clock a.m. Tuesday, August 1, 1905, and ending at 6 o'clock p.m. Saturday, August 12, 1905, a registration will be had at Vernal, Price and Provo, State of Utah, and at Grand Junction, State of Colorado, for the purpose as ascertaining what persons desire to enter, settle upon, and acquire title to any of said lands under the homestead law, and of ascertaining their qualifications so to do. To obtain registration each applicant will be required to

Places of registration.

show himself duly qualified, by written application to be made only on a blank form provided by the Commissioner of the General Land Office, to make homestead entry of these lands under existing laws, and to give the registering officer such appropriate matters of description and identity as will protect the applicant and the Government against any attempted impersonation. Registration cannot be effected through the use of the mails or the employment of an agent, excepting that honorably discharged soldiers and sailors entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of Congress, approved March 1, 1901 (31 Stat., 847), may present their applications for registration and due proofs of their qualifications through an agent of their own selection, having a duly executed power of attorney on a blank form provided by the Commissioner of the General Land Office, but no person will be permitted to act as agent for more than one such soldier or sailor. No person will be permitted to register more than once or in any other than his true name.

Applications.

R.S., sec. 2304, p. 422.

31 Stat., 847.

Each applicant who shows himself duly qualified will be registered and given a nontransferable certificate to that effect, which will entitle him to go upon and examine the lands to be opened hereunder; but the only purpose for which he can go upon and examine said lands is that of enabling him later on, as herein provided, to understandingly select the lands for which he may make entry. No one will be permitted to make settlement upon any of said lands in advance of the opening herein provided for, and during the first sixty days following said opening no one but registered applicants will be permitted to make homestead settlement upon any of said lands and then only in pursuance of a homestead entry duly allowed

Certificate of registration.

Restrictions.



by the local land officers, or of a soldier's declaratory statement duly accepted by such officers.

The order in which, during the first sixty days following the opening, the registered applicants will be permitted to make homestead entry of the lands opened hereunder, will be determined by a drawing for the district publicly held at Provo, Utah, commencing at 9 o'clock a.m., Thursday, August 17, 1905, and continuing for such period as may be necessary to complete the same. The drawing will be had under the supervision and immediate observance of a committee of three persons whose integrity is such as to make their control of the drawing a guaranty of its fairness. The members of this committee will be appointed by the Secretary of the Interior, who will prescribe suitable compensation for their services. Preparatory to this drawing the registration officers will, at the time of registering each applicant who shows himself duly qualified, make out a card, which must be signed by the applicant, and giving such a description of the applicant as will enable the local land officers to thereafter identify him. This card will be subsequently sealed in a separate envelope which will bear no other distinguishing label or mark than such as may be necessary to show that it is to go into the drawing. These envelopes will be carefully preserved and remain sealed until opened in the course of the drawing herein provided. When the registration is completed, all of these sealed envelopes will be brought together at the place of drawing and turned over to the committee in charge of the drawing, who, in such manner as in their judgment will be attended with entire fairness and equality of opportunity, shall proceed to draw out and open the separate envelopes and to give to each inclosed card a number in the order in which the envelope containing the same is drawn. The result of the drawing will be certified by

Drawings.

the committee to the officers of the district and will determine the order in which the applicants may make homestead entry of said lands and settlement thereon.

Notice.

Notice of the drawings, stating the name of each applicant and number assigned to him by the drawing, will be posted each day at the place of drawing, and each applicant will be notified of his number, and of the day upon which he must make his entry, by a postal card mailed to him at the address given by him at the time of registration. The result of each day's drawing will also be given to the press to be published as a matter of news. Applications for homestead entry of said lands during the first sixty days following the opening can be made only by registered applicants and in the order established by the drawing.

Applications.

Commencing on Monday, August 28, 1905, at 9 o'clock a.m., the applications of those drawing numbers 1 to 50, inclusive, must be presented at the land office in the town of Vernal, Utah, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 51 to 100, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.



Certificates of registration.

To obtain the allowance of a homestead entry, each applicant must personally present the certificate of registration theretofore issued to him, together with a regular homestead application and the necessary accompanying proofs, together with the regular land office fees, but an honorably discharged soldier or sailor may file his declaratory statement through his agent, who can represent but one soldier or sailor as in the matter of registration.

Payments.

Persons who make homestead entry for any of these lands will be required to pay therefor at the rate of one dollar and twenty-five cents per acre when they make final proof, but no payment, other than the usual fees and commissions will be required at the time the entry is made.

Nonmineral affidavits.

Persons who apply to make entry of these lands prior to October 27, 1905, will not be required to file the usual nonmineral affidavit with their applications to enter, but such affidavit must be filed before final proof is accepted under their entries; but all persons who make entry after that date will be required to file that affidavit with their applications to enter.

Entries.

The production of the certificate of registration will be dispensed with only upon satisfactory proof of its loss or destruction. If at the time of considering his regular application for entry it appears that an applicant is disqualified from making homestead entry of these lands, his application will be rejected, notwithstanding his prior registration. If any applicant shall register more than once hereunder, or in any other than his true name, or shall transfer his registration certificate, he will thereby lose all the benefits of the registration and drawing herein provided for, and will be precluded from entering or settling upon any of said lands during the first sixty days following said opening.

Townsites.

Any person or persons desiring to found, or to suggest establishing, a townsite upon any of the said lands, at any point, may, at any time before the opening herein provided for, file in the land office a written application to that effect, describing by legal subdivisions the lands intended to be affected, and stating fully and under oath the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commissioner of the General Land Office with their recommendation in the premises. Such Commissioner, if he believes the public interests will be subserved thereby, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the time being for disposal under the townsite laws of the United States in such manner as the Secretary of the Interior may from time to time direct; and, if at any time after such withdrawal has been made it is determined that the lands so withdrawn are needed for townsite purposes they may be released from such withdrawal and then disposed of under the general provisions of the homestead laws in the manner prescribed herein.

Entry of undisposed-of lands.

All persons are especially admonished that under the said act of Congress approved March 3, 1905, it is provided that no person shall be permitted to settle upon, occupy, or enter any of said lands except in the manner prescribed in this proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry. After the expiration of the said period of sixty days, but not before, as hereinbefore prescribed, any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general provisions of the homestead and townsite laws of the United States in



like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law.

Regulations.

The Secretary of the Interior shall prescribe all needful rules and regulations necessary to carry into full effect the opening herein provided for.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed. Done at the city of Washington this 14th July, in the year of our Lord 1905, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] THEODORE ROOSEVELT

BY THE PRESIDENT:
ALVEY A. ADEE
*Acting Secretary of State.*

---

**~~16. Presidential Proclamation of July 31, 1905, 34~~ Stat., pt. 3, 3139, III Kapp. 609 (1913), LD 110:**

## BY THE PRESIDENT OF THE UNITED STATES. A PROCLAMATION

July 31, 1905.
Proclamations.
34 Stat., Part 3, 3139.
Uintah Indian Reservation, Utah.
Preamble.

Whereas, on June 7, 1905, the Secretary of the Interior directed the Commissioner of Indian Affairs to cause to be selected, by the Uintah Allotment Commission, one or more tracts of land, suitable for townsite purposes, in the Uintah Indian Reservation Lands, State of Utah, to the end that the same might be reserved

**APPENDIX E**

Dennis L. Draney, #913
DUCHESNE COUNTY ATTORNEY
Attorney for Plaintiff
P. O. Box 206
Duchesne, Utah 84021
(801) 738-2624

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH, | ) | |
| | ) | |
| Plaintiff/Respondent, | ) | STIPULATION |
| vs. | ) | |
| | ) | |
| CLINTON PERANK, | ) | |
| | ) | |
| Defendant/Apppellant. | ) | Case No. 860243 |

COME NOW the parties, by and through their respective counsel pursuant to the Order of the District Court, and stipulate that the record in the case of the Ute Indian Tribe vs State of Utah, et al, case numbers 81-1827 and 81-1909, Tenth Circuit Court of Appeals, may be part of the record in this case for the purpose of determining the boundary issue herein.

DATED this 8th day of October, 1986.

/s/ Dennis L. Draney
Attorney for Plaintiff/Respondent

/s/ Kirk C. Bennett
Attorney for Defendant/Appellant



No. 92-6281
IN the SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1992

| | | |
|---|---|---|
| ROBERT P. HAGEN, | ) | |
| | ) | |
| PETITIONER, | ) | |
| vs. | ) | STIPULATION |
| | ) | OF RECORD |
| STATE OF UTAH, | ) | |
| | ) | |
| RESPONDENT. | ) | |

COMES NOW the parties, by and through their respective counsel, and hereby stipulate as follows:

1. That pursuant to a stipulation between the parties in State v. Perank, No. 860243, decided by the Utah Supreme Court, July 17, 1992, a copy of which is attached hereto, the designated record in Ute Indian Tribe v. State of Utah, et al., 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986), was made part of the record in State v. Perank, and together with all appellate briefs, the same being submitted and forwarded to Utah Supreme Court, together with a cover letter, a copy of which is attached hereto.

2. That in this case, State v. Hagen, No. 910017, 191 Utah Adv. Rep. 26, ___ P.2d ___ (1992), cert. pending, No. 92-6281, the Utah Supreme Court expressly held that its decision in Perank, decided the same day, resolved the same issue here.

3. That the record as set forth above shall also constitute the record in State v. Hagen.

R. Paul Van Dam
Utah Attorney General

/s/ Michael M. Quealy
Michael M. Quealy
David B. Thompson
Assistant Attorneys General
1636 West North Temple, #300
Salt Lake City, Utah 84116
Counsel for Respondent

/s/ Joel Berrett
Joel D. Berrett
P.O. Box 262
Roosevelt, Utah 84066
Counsel for Petitioner

Supreme Court, U.S.
FILED
DEC 2 1992
OFFICE OF THE CLERK

NO. 92-6281

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT P. HAGEN,

PETITIONER,

vs.

STATE OF UTAH,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF UTAH

# SUPPLEMENTAL BRIEF FILED BY PETITIONER IN RESPONSE TO THE BRIEF OF AMICUS CURIAE UTE INDIAN TRIBE

Joel D. Berrett
P.O. Box 262
Roosevelt, Utah 84066
Telephone: (801, 722-3606
Counsel for Petitioner

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 9
To Kathy Lycz | From SENECA
Co | Co
Dept | Phone # 703 471-5424
Fax # 202 479 3021 | Fax #

NO. 92-6281

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT P. HAGEN,

PETITIONER,

vs.

STATE OF UTAH,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF UTAH

SUPPLEMENTAL BRIEF FILED BY PETITIONER

IN RESPONSE TO THE BRIEF OF AMICUS CURIAE

UTE INDIAN TRIBE

Joel D. Berrett
P.O. Box 262
Roosevelt, Utah 84066
Telephone: (801, 722-3606
Counsel for Petitioner

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NO. 92-6281

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

ROBERT P. HAGEN,

PETITIONER,

vs.

STATE OF UTAH,

RESPONDENT.

SUPPLEMENTAL BRIEF FILED BY PETITIONER

IN RESPONSE TO THE BRIEF OF AMICUS CURIAE

UTE INDIAN TRIBE

Petitioner, Robert P. Hagen, respectfully submits this supplemental brief in response to the brief of Amicus Curiae, Ute Indian Tribe.

1. In it's brief, the Ute Indian Tribe couched the question presented in terms of whether the State of Utah should be prevented from relitigating the issue of whether the Uintah and Ouray Indian Reservation had been disestablished. Rule 14.1.(a), of the Rules of the Supreme Court of the United States, states that "only the question set forth in the petition or fairly included therein will be



considered by the court." The question presented in the petition was whether the reservation had been diminished by acts of congress. The rule does not appear to allow different issues to be raised. The Ute Indian Tribe argues that the Supreme Court of the State of Utah should have reached a different decision in State v. Perank , 191 Utah Adv. Rep. 5 (1992) based on the doctrine of collateral estoppel, comity and finality. Regardless of the opinion held by the Ute Indian Tribe of the Perank decision, the decision has been made and is controlling in petitioner's case. Rule 10 of the Rules of the Court does not address how the conflict arose or the order in which the opinions of the courts were filed. This court should accept certiorari because of the conflicting opinions of the Tenth Circuit Court of Appeals and the Supreme Court of the State of Utah.

2. In its brief, the Ute Indian Tribe argues that this court should not grant certiorari due to a pending civil action in the United States District Court for the district of Utah. That action is of little comfort to the petitioner who has been sentenced to a term of 0-5 years in the Utah State Penitentiary. He is not a party to the federal litigation nor a member of the Ute Indian Tribe. His petition was filed in this court in forma pauperis. His counsel is appointed. It is not likely he will be entitled to have counsel appointed for him in the civil case pending in the Federal District Court.

The result of the Ute Indian Tribe's efforts to prevent the state from enforcing the Perank decision may

or may not affect petitioner. The remedies available to petitioner in this court should not be denied him because of the litigation instigated by the Ute Indian Tribe. The action which was filed by the Ute Indian Tribe in the district court only underscores the need for this court to grant certiorari and determine the boundaries of the Uintah and Ouray Indian Reservation.

3. In its brief, the Ute Indian Tribe erroneously states in paragraph 8 that the petitioner suggested that the tribe had a full and fair opportunity to litigate the reservation boundary issue in the state court proceedings. Rather the petitioner stated that both the Ute Indian Tribe and the State of Utah had a full and fair opportunity to litigate the issue which was adjudicated on the merits by the Tenth Circuit.

The Ute Indian Tribe also states "After hearing oral argument in Perank's appeal, the Utah Supreme Court invited the Ute Indian Tribe to file an amicus brief in the Perank case. The tribe filed its brief on July 19, 1988 and the case was argued before the Utah Supreme Court on October 8, 1988. Furthermore, the Supreme Court of the State of Utah had the benefit of the entire record considered by the Tenth Circuit including copies of all briefs submitted by the parties which were filed with the Tenth Circuit. (Appendix A).

4. The Ute Indian Tribe on page 3 of its brief states that a federal action against petitioner was dismissed for lack of jurisdiction after the court



determined that petitioner was not an Indian for criminal jurisidiction purposes. The tribe further states that petitioner argued in federal court that he was non-Indian. The tribe argues that petitioner later argued in state court that the state had no jurisdiction against him because he was an Indian. No criminal charges were filed against petitioner in federal court and there was no court determination that he was not an Indian for purposes of criminal jurisdiction. The state mistakenly thought charges had been filed against petitioner in federal court. Petitioner did not claim to be non-Indian in federal court rather has maintained throughout these proceedings that he is an Indian.

5. The Ute Indian Tribe states in its brief that petitioner is non-Indian. The primary argument of the Ute Indian Tribe is that petitioner is not an Indian for criminal jurisdiction purposes since he is not a member of a federally recognized Indian tribe. Petitioner is a member of the Little Shell Tribe of Chippewa Indians, a non federally recognized tribe of Indians. A person may still be an Indian for purposes of criminal jurisdiction although not enrolled with a recognized tribe. St. Cloud v. U.S. , 702 F. Supp. 1756 (D.S.D. 1988) citing United States v. Broncheau , 597 F. 2d 1260 (9th Cir. 1979), cert.denied , 444 U.S. 859. Enrollment in a tribe is only one of the factors in determining whether a person is recognized as an Indian. St. Cloud , supra.

Counsel for the Ute Indian Tribe argues that

petitioner is non-Indian, however on August 11, 1992 petitioner was sentenced for a simple assault in the Ute Indian Tribal Court. (Appendix B). Tribal Courts have no criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe , 435 U.S. 191 (1978).

CONCLUSION

Based on the petition for Writ of Certiorari filed by Mr. Hagen, the briefs filed by the State of Utah, the Utah Counties of Duchesne and Uintah and the States of California, North Dakota, South Dakota and Washington, the petitioner urges that his petition for a Writ of Certiorari be granted.

DATED this 30 day of November, 1992.

Joel D. Berrett
Attorney for Petitioner



HERBERT WM. GILLESPIE, #1191
ACTING DUCHESNE COUNTY ATTORNEY
Attorney for Plaintiff
P. O. Box 206
Duchesne, Utah 84021
(801) 738-2624

THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH
IN AND FOR DUCHESNE COUNTY

| | |
|---|---|
| STATE OF UTAH, Plaintiff/Respondent, vs. CLINTON PERANK, Defendant/Appellant. | STIPULATION Criminal No. 1121 |

COME NOW the parties, by and through their respective counsel pursuant to the Order of the District Court, and stipulate as follows:

1. That the record to be considered in this appeal shall be photo copies of that portion of the Federal District Court record which was designated as the record on appeal in the case of Ute Indian Tribe vs. State of Utah, et al, case numbers 81-1827 and 81-1909.

2 That in addition to the designated record on appeal, the parties shall provide for the convenience and consideration of the Court, copies of all briefs submitted throughout the ap- pellate process of the above-entitled cases.

DATED this 5 day of March, 1987.

Attorney for:
Plaintiff/Respondent

Attorney for:
Defendant/Appellant

APPENDIX A

se no. CR 701-92
tation no

# Ute Indian Tribal
# COURT DOCKET

THE UTE INDIAN TRIBE,

-vs-

Robert P Hagen
Defendant

olation date MAY 10, 1992 Complaining witness LISA FRISBY

HARGES

SIMPLE ASSAULT 2

ction no 13-4-4 Section no

ARRANT ISSUED 19 Warrant no

MMONS ISSUED 19 Returned endorsed 19

NUTES 5-11-92 FILED

EA(S) 5-12-92

Not Guilty class B 2

Eurost
Clerk of the Court

DER AND COMMITMENT

On this 11th day of August, 1992, the above named defendant has been found GUILTY of the violation(s). It is therefore ordered that:

$100.00 fine & 25.00 Court Cost.

45 days in jail, Suspended.

(XX) Granted 30 days time to pay, until September 11, 1992.

BY THE ORDER OF:

Judge of the Ute Tribal Court

ount of fine: $100.00 Court cost: $25.00

| DATE | RECEIPT # | AMOUNT | BALANCE |
|---|---|---|---|
| | | | |
| | | | |
| | | | |

BAIL CASH ( ) Receipt #

PROPERTY ( ) Description

PERSONAL RECOGNIZANCE ( )

BOND on 19

BOND on 19

BOND on 19

SE CLOSED ON 19

ERK

APPENDIX B

ORIGINAL

Supreme Court, U.S.
FILED
APR 2 1993
OFFICE OF THE CLERK

DISTRIBUTED
APR 5 1993

NO. 92-6281

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

ROBERT P. HAGEN,

PETITIONER,

VS.

STATE OF UTAH,

RESPONDENT.

SUPPLEMENTAL BRIEF FILED BY PETITIONER

Petitioner, Robert P. Hagen, respectfully submits this supplemental brief.

Since petitioner filed a supplemental brief on November 30, 1992, the Honorable Bruce S. Jenkins of the United States District Court for the District of Utah issued an order in Case No. 75-C-408J, a copy of which is attached hereto as Exhibit A. Of interest is the court's statement on the bottom of page 3 of the order that the district court believes that this court should decide the issue presented to it in the Petition for Writ of Certiorari filed by petitioner.

CONCLUSION

Based on the briefs filed by the parties and others in this matter the petitioner urges that his Petition for a Writ of Certiorari be granted.

DATED this 2 day of April, 1993.

Joel D. Berrett
Attorney for Petitioner

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH
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MARKUS B. ZIMMER
CLERK
BY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

| | |
|---|---|
| UTE INDIAN TRIBE of the Uintah and Ouray Reservation, Utah,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF UTAH,<br><br>Defendant-in-Intervention,<br><br>and,<br><br>DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,<br><br>Defendants.<br><br>UNITED STATES OF AMERICA and PARADOX PRODUCTION CORPORATION, a Utah corporation,<br><br>Amici Curiae. | ORDER<br><br>Case No. 75-C-408J |

On August 3, 1992, the Ute Indian Tribe of the Uintah and Ouray Reservation in the State of Utah (the "tribe"), filed a Motion with this court seeking a temporary restraining order pending a hearing on the Tribe's motion for injunctive relief. The

matter came on for hearing on August 6, 1992. At the hearing, the State of Utah agreed, on behalf of itself and its political subdivisions, to refrain from enforcing the Utah Supreme Court's decision in State v. Perank, No. 860243 (Utah July 17, 1992), from exercising civil or criminal jurisdiction in a manner that conflicts with federal law within the exterior boundaries of the Uintah and Ouray Reservation, as those boundaries were set forth by the Tenth Circuit Court of Appeals in Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986), or from interfering with the Tribe's exercise of criminal, civil and regulatory jurisdiction, consistent with federal and tribal law, within the exterior boundaries of the Uintah and Ouray Reservation, as those boundaries were set forth in Ute Indian Tribe, 773 F.2d at 1087. The foregoing stipulation was memorialized in an August 31, 1992 Order of the court.

At the August 6 hearing, the court also set a briefing schedule with respect to the Tribe's motion for injunctive relief. A hearing on the Tribe's motion was subsequently set for December 22, 1992 at 9:30 a.m.

Since that time, Robert P. Hagen, a defendant in a companion case to State v. Perank, filed a timely petition for a writ of certiorari with the United States Supreme Court, seeking review of the Perank/Hagen decisions of the Utah Supreme Court. The State of Utah has filed a brief urging the United States Supreme Court to grant certiorari. The local defendants have also filed an amicus curiae brief in support of certiorari, as have the States of



California, North Dakota, South Dakota, and Washington. The Ute Indian Tribe filed an amicus curie brief opposing certiorari, citing the current proceedings before this court as a reason for denying certiorari. On December 7, 1992, the United States Supreme Court entered an Order in Hagen v. State of Utah, inviting the United States Solicitor General to file a brief expressing the views of the United States.

In light of the petition now before the United States Supeme Court concerning Hagen v. State of Utah, this court vacates, on its own motion, the hearing for injunctive relief set for December 22, 1992, and reschedules the matter for April 14, 1993 at 9:30 a.m, pending the decision of the United States Supreme Court. As set forth above, the State and local defendants have stipulated not to enforce or take any action in reliance on the Perank/Hagen cases pending the outcome of the proceedings before the United States Supreme Court. The Utah Supreme Court has also stayed the remittitur in the Perank/Hagen cases. Thus, the Tribe and its members are under no immediate threat of any action by the State of Utah, and their interests will not be impaired by the limited postponement of the hearing pending disposition of the certiorari petition by the United States Supreme Court.

This court believes that the preferable avenue to resolve the conflict between state and federal courts in this regard is to have the United States Supreme Court decide the issue on petition before it. See, e.g., District of Columbia Court of Appeals v. Feldman,

460 U.S. 462 (1983). However, if certiorari is denied, the instant proceedings can proceed in relatively short order.

IT IS SO ORDERED.

Dated this 17 day of December, 1992.

BY THE COURT:

BRUCE S. JENKINS, CHIEF JUDGE
UNITED STATES DISTRICT COURT



No. 92-6281

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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SUPREME COURT, U.S.

ROBERT P. HAGEN,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

CERTIFICATE OF SERVICE

I hereby certify that one true and accurate copy of the accompanying SUPPLEMENTAL BRIEF FILED BY PETITIONER was mailed this 2 day of April, 1993, postage prepaid to the following:

Robert S. Thompson, III
WHITEING & THOMPSON
Attorneys for Amicus Curiae
Ute Indian Tribe
1136 Pearl Street, Suite 203
BOULDER, CO 80302

Williams C. Bryson
Department of Justice
Washington, D.C. 20530

Michael M. Quealey
Assistant Attorney General
1636 West Temple Suite 300
Salt Lake City, Utah 84116

Tom Tobin
P.O. Box 730
Winner, S.D. 57580

Daniel E. Lungren
Attorney General
1515 K Street
Sacramento, CA 95814

Lawrence E. Long
Chief Deputy Attorney General
500 East Capitol
Pierre, SD 57501

Charles Carvell
Assistant Attorney General
600 East Boulevard
Bismarck, ND 58505

Ken Eikenberry
Attorney General
Highways-Licenses Building
PB-71
Olympia, WA 98504

Joel Berrett

Joel D. Berrett
Attorney for Petitioner
P.O. Box 262
Roosevelt, Utah 84066

No. 92-6281

FILED
MAR 23 1993
OFFICE OF THE CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1992

---

ROBERT HAGEN, PETITIONER

*v.*

STATE OF UTAH

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH*

---

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

---

WILLIAM C. BRYSON
*Acting Solicitor General*

MYLES E. FLINT
*Acting Assistant Attorney General*

EDWIN S. KNEEDLER
*Assistant to the Solicitor General*

RONALD J. MANN
*Assistant to the Solicitor General*

MARTIN W. MATZEN
EDWARD J. SHAWAKER
KATHERINE L. ADAMS
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the Uintah Indian Reservation in Utah was diminished by the Act of May 27, 1902, ch. 888, 32 Stat. 245, or the Act of March 3, 1905, ch. 1479, 33 Stat. 1069.

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| Discussion | 5 |
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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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No. 92-6281

ROBERT HAGEN, PETITIONER

*v.*

STATE OF UTAH

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

### STATEMENT

1. On October 3, 1861, President Lincoln established an Indian reservation along the Uintah River in the Territory of Utah. Exec. Order No. 38-1. Congress confirmed the President's action in 1864, providing that the land in question was "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of [the Utah] territory as may be induced to inhabit the same." Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63.

In 1902, Congress passed an Act providing that if a majority of the adult male members of the Uintah and White River Tribes of Ute Indians consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Indian Reservation; the allotments were to be in the amount of 80 acres to each head of a family and 40 acres to each other member of the Tribes. Act of May 27, 1902, ch. 888, § 1, 32 Stat. 263-264. That Act further provided that when the October 1, 1903, deadline passed, "all the unallotted lands within said reservation shall be restored to the public domain," and that those lands would be subject to entry under the homestead laws, at a rate of $1.25 per acre. 32 Stat. 263. Finally, the Act provided that the net proceeds of the sale of the lands restored to the public domain, "under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians." 32 Stat. 264.[1]

Because of the steady opposition of the Uintah and White River Tribes, the allotments did not proceed as provided for by the May 1902 Act. As a compromise, Congress in 1903 directed the Secretary to allot the land unilaterally if the Indians did not give their consent by June 1 of that year. Act of Mar. 3, 1903,

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[1] A month later, Congress supplemented the May 1902 Act with a provision requiring the Secretary,

> [i]n addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, * * * [to] select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

Joint Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902).



ch. 994, § 1, 32 Stat. 997-998. The March 1903 Act also extended the time for the "opening [of] the unallotted lands to public entry on said Uintah Reservation" until October 1, 1904. 32 Stat. 998. When the Tribes continued to oppose the plan, Congress again deferred the opening date, to March 10, 1905. Act of Apr. 21, 1904, ch. 1402, § 1, 33 Stat. 207-208.

By the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, Congress again deferred the time for opening the unallotted lands to public entry, this time to September 1, 1905, unless the President determined that the lands should be opened at an earlier date. § 1, 33 Stat. 1069. The March 1905 Act then specified "the manner of opening such lands for settlement and entry, and for disposing of the same." *Ibid.* Specifically, it provided that the unallotted lands (except for tracts set aside as a national forest reserve and certain mineral lands disposed of in 1902) "shall be disposed of under the general provisions of the homestead and town-site laws of the United States." *Ibid.* All lands "opened to settlement and entry under this Act remaining undisposed of [within five years]" were to "be sold and disposed of for cash, under rules and regulations prescribed by the Secretary of the Interior." *Ibid.* The proceeds of the sale of unallotted lands were to be applied, in accordance with the May 1902 Act, for the benefit of the Tribes. 33 Stat. 1070.

2. In 1989, petitioner was charged with distribution of a controlled substance in the District Court of Duchesne County in Utah. The offense occurred in the Town of Myton, which is within a portion of the original Uintah Reservation that was opened to non-Indian settlement by the March 1905 Act. Petitioner initially pleaded guilty. Before sentencing, however,

petitioner filed a motion to arrest the judgment and to withdraw his guilty plea; he contended that the trial court did not have jurisdiction because he is an Indian and the crime had been committed in "Indian country" that is not subject to the jurisdiction of the State of Utah.[2] The state trial court denied that motion, finding that petitioner is not an Indian for purposes of principles governing state jurisdiction over crimes committed by or against Indians in Indian country. Pet. App. I; see Pet. App. A.

3. The Utah Court of Appeals reversed. *State* v. *Hagen*, 802 P.2d 745 (1990). The court noted that the Tenth Circuit has held that Myton and other areas opened to non-Indian settlement by the 1905 Act remain within the Uintah Indian Reservation. *Id.* at 747 (citing *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087 (1985) (en banc), cert. denied, 479 U.S. 994 (1986)). The court also concluded that the State failed to introduce sufficient evidence in the trial court in this case to justify a finding that petitioner is not an Indian. 802 P.2d at 747-748. Accordingly, the court reversed petitioner's conviction and ordered him discharged. *Id.* at 748.

4. The Utah Supreme Court granted the State's petition for a writ of certiorari and reversed the

[2] "Indian country" is defined by 18 U.S.C. 1151 to include "all land within the limits of any Indian reservation under the jurisdiction of the United States government." As a general matter, a State has jurisdiction over an offense committed by or against an Indian in Indian country only where Congress has granted jurisdiction to the State—*e.g.*, under Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-590. See, *e.g.*, *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Utah has not acquired jurisdiction over Indian country pursuant to Public Law 280.



decision of the Utah Court of Appeals. Pet. App. A1. In a brief opinion, the court explained that it viewed the case as controlled by its decision in *State* v. *Perank*, Resp. Br. App. 4a-75a,[3] which was issued on the same day as the decision in this case. In *Perank*, the Utah Supreme Court concluded that the May 1902 Act and the March 1905 Act diminished the Uintah Indian Reservation and that the town of Myton accordingly lies outside the boundaries of the Reservation. See *id.* at 28a-63a. Relying on that conclusion in *Perank*, the Utah Supreme Court reinstated petitioner's conviction. Pet. App. A1.

## DISCUSSION

The decision of the Utah Supreme Court in this case conflicts with the resolution of the same question by an en banc decision of the federal court of appeals having jurisdiction over cases arising in Utah. *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087, 1088-1089 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). Moreover, in our view the decision incorrectly applies the principles set forth by this Court for determining when an Act of Congress will be held to have diminished an Indian reservation. Accordingly, the petition for a writ of certiorari should be granted.[4]

[3] The *Perank* decision also appears in photocopy form at Pet. App. B. For convenience, we cite to the opinion as reprinted in the appendix to respondent's brief acquiescing in certiorari.

[4] Because the Utah Supreme Court concluded that the offense in question did not occur in Indian country, it did not decide whether petitioner is an Indian who is immune from state jurisdiction for acts committed in Indian country. See Pet. App. A. Petitioner claims to be a member of the "Little

1. Like several of this Court's previous cases, the present controversy turns on the effect of a surplus land Act opening an Indian reservation to settlement by non-Indians. The Congress that passed that statute (and others like it) no doubt anticipated the eventual demise of the reservation system. But this Court has

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Shell Tribe of Chippewa Indians." See *State* v. *Hagen*, 802 P.2d 745, 747 (Utah Ct. App. 1990). The Department of the Interior does not recognize such a tribe. See List of Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 53 Fed. Reg. 52,829 (1988). Although Congress in 1982 provided for distribution of judgment funds to members of the Little Shell Tribe of Chippewa Indians, it specifically acknowledged that the Tribe was not federally recognized. Act of Dec. 31, 1982, Pub. L. No. 97-403, § 6, 96 Stat. 2023-2024. The Department of the Interior has informed us that the Little Shell group did not pursue its petition for federal recognition following enactment of the 1982 legislation distributing the judgment fund.

Indian status for jurisdictional purposes is dependent upon some affiliation (although not necessarily enrollment) with a federally-recognized Indian tribe or entity, see *United States* v. *Antelope*, 430 U.S. 641, 646-647 n.7 (1977), even if only by descent, cf. 25 U.S.C. 479. For that reason, petitioner's status apparently would not bar the exercise of state jurisdiction in this case even if, as we submit, his offense did occur in Indian country. The diminishment/jurisdictional issue therefore comes to the Court in a decidedly hypothetical context. Nonetheless, because the Utah Supreme Court already had decided that issue in the companion *Perank* case, it is understandable that it then would choose to apply that ruling in this case, without reaching the question of petitioner's status as an Indian. And whatever the wisdom of proceeding in that manner, the fact remains that the Utah Supreme Court did decide the diminishment/jurisdictional issue in this case as well as *Perank*, and thus the question is properly presented in this case.



never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus land Acts diminished reservations, see, *e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and other surplus land Acts did not, see, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

*Solem* v. *Bartlett*, 465 U.S. 463, 468-469 (1984). As the Court explained in *Solem*, the Court's prior decisions have established a "fairly clean analytical structure" for distinguishing those surplus land Acts that of their own force effected an immediate diminishment of the reservation from those that simply permitted non-Indians to purchase land within an existing reservation and left to another day the actual redrawing of its boundaries. *Id.* at 470.

The "first and governing principle" is that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The most probative evidence of congressional intent is the statutory language used to open the reservation. Language that explicitly refers to a "cession" or otherwise "evidenc[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress means to sever it from the reservation. *Ibid.* When such language is accompanied by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."

*Id.* at 470-471. Cession language and unconditional compensation are not, however, absolute prerequisites to a finding of diminishment. "When events surrounding the passage of a surplus land Act * * * unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the Court has inferred that Congress intended to diminish the reservation. *Id.* at 471. "There are, of course, limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act." *Id.* at 472. Accordingly, if the text and legislative history of the Act fail to reveal "substantial and compelling evidence of a congressional intention" to diminish, the "traditional solicitude for the Indian tribes" requires a ruling that the reservation remains intact. *Ibid.*

Application of the foregoing principles makes it clear that the land in question here has not been removed from the Uintah Indian Reservation.

a. *The Act of Mar. 3, 1905.*—Our analysis begins with the 1905 Act, which opened a portion of the Reservation to non-Indian settlement. It was that Act that, by its terms, specified "the manner of opening such [unallotted] lands for settlement and entry, and for disposing of the same." 33 Stat. 1069. It provided that the "unallotted lands on the Uintah Reservation * * * shall be disposed of under the general provisions of the homestead and town-site laws of the United States." *Ibid.* That language does not refer to a "cession" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the unallotted lands, *Solem*, 465 U.S. at 470.[5] More-

[5] Compare *DeCoteau* v. *District County Court*, 420 U.S. 425, 445 (1975) (finding disestablishment where Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands"); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 596-597 (1977) (finding diminishment where Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted").



over, it is clear from this Court's cases that language generally providing for disposition of lands under the homestead laws is not sufficient to work a severance of the lands from an Indian reservation. As the Court unanimously held in two pre-*Solem* cases, such statutes did not terminate a reservation, but merely "open[ed] the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Mattz* v. *Arnett*, 412 U.S. 481, 497 (1973) (quoting *Seymour* v. *Superintendent*, 368 U.S. 351, 356 (1962)).[6]

The limited import of the 1905 Act is underscored by its failure to provide for payment of a sum certain by the United States, which might have suggested an intent to effect an immediate divestment of all tribal interest as a quid pro quo. *DeCoteau* v. *District County Court*, 420 U.S. 425, 445-446 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 598 n.20 (1977). Rather, the Tribe was to receive nothing until and unless unallotted lands were sold, and in the meantime it retained an equitable interest in

[6] Indeed, although the *Solem* Court did not focus on the point, the Act involved in *Solem*—which was held insufficient to effect a diminishment—also provided for the disposition of unallotted lands under the "homestead and town-site laws." Act of May 29, 1908, ch. 218, § 2, 35 Stat. 461.

them. *Ash Sheep Company* v. *United States*, 252 U.S. 159, 166 (1920). In similar circumstances, where a statute "benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers," *DeCoteau*, 420 U.S. at 448, this Court has concluded that Congress did not intend to diminish a reservation. As the Court explained in *Seymour*, an Act that merely opens surplus lands for non-Indian settlement, with the proceeds of land sales to be held in trust for the tribe, is generally understood as leaving reservation boundaries intact. 368 U.S. at 355-356.

b. *The Act of May 27, 1902.*—The 1902 Act also fails to furnish the "substantial and compelling evidence of a congressional intention" to diminish, *Solem*, 465 U.S. at 472, that is a necessary condition to holding that the lands at issue in this case have been removed from the Uintah Indian Reservation. The principal feature of the 1902 Act that respondent cites as supporting a finding of diminishment is the phrase stating that the unallotted lands would "be restored to the public domain." 32 Stat. 263.[7] Respondent correctly notes (Resp. Br. 17-18) that this Court has suggested that the use of statutory language requiring restoration of Indian lands "to public domain" is evidence of a congressional intent to disestablish. But in our view respondent greatly overstates its case in arguing (Resp. Br. 17) that the language provides "firm and unequivocal language of disestablishment."

As the Court made clear in *Solem*, statutory language indicating that surplus lands were to be "part of the public domain" is "hardly dispositive," because

[7] The Utah Supreme Court placed great weight on this phrase in its decision in *Perank*. Resp. Br. App. 20a-28a.



such a reference could have meant simply that the lands were opened to settlement. 465 U.S. at 475 & n.17; see also *Newhall* v. *Sanger*, 92 U.S. 761, 763 (1876) ("The words 'public lands' are habitually used * * * to describe such as are subject to sale or other disposal under general laws."). In so ruling, the *Solem* Court expressly rejected the notion that a reference to the "public domain" has a talismanic effect that renders it unnecessary to consider other aspects of the text, the legislative history, and the surrounding circumstances. 465 U.S. at 475 & nn.16-17.

More importantly, respondent's exclusive reliance on the "public domain" language in the 1902 Act ignores the conditioning of the allotment and restoration provisions of the 1902 Act upon the Indians' consent, 32 Stat. 263-264, which was not forthcoming. When Congress unilaterally opened the unallotted lands pursuant to the 1905 Act, it did not carry forward the language in the 1902 Act that would have restored those lands to the "public domain." Instead, the 1905 Act provided simply that the unallotted lands were to be "disposed of under the general provisions of the homestead and town-site laws of the United States." 33 Stat. 1069. As we have explained above, this Court's decisions in *Solem*, *Mattz*, and *Seymour* all make it clear that language like the language on which respondent relies is not sufficient to require a holding that a reservation has been diminished or disestablished.

At bottom, the Utah Supreme Court's analysis rests on the conclusion that the 1905 Act evidenced an intent to diminish the Uintah Indian Reservation by implicitly incorporating a phrase from the 1902 Act. Given the omission of that phrase from the 1905 Act, the failure of the conditions on which the 1902 Act

was predicated, and the ambiguity of the phrase in the first place, we submit that respondent has failed to carry its burden of producing substantial and compelling evidence of a congressional intention to diminish. Accordingly, we believe that the Utah Supreme Court erred in holding that the Reservation was diminished.

2. The decision of the Supreme Court of Utah directly conflicts with the en banc decision of the Tenth Circuit in *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087 (1985), cert. denied, 479 U.S. 994 (1986). In that case, the Tenth Circuit held that the provisions of the 1902 and 1905 Acts opening portions of the Uintah Indian Reservation to non-Indian settlement did not diminish that Reservation. 773 F.2d at 1088-1089.

As this Court has recognized, a conflict regarding the extent of Indian country within a State between the decision of the highest court of a State and the federal court of appeals having jurisdiction in the State presents significant difficulties that call for the exercise of this Court's certiorari jurisdiction. See *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984); *DeCoteau* v. *District County Court*, 420 U.S. 425, 430-431 (1975). This case is different in one significant respect, however. The contrary ruling by the federal court of appeals was rendered in a case brought by the Tribe itself against the counties in which the land in question is situated, with a view toward broadly resolving the diminishment/jurisdictional issue. Neither the State nor the counties objected to the nature of that lawsuit; indeed, the State voluntarily intervened in the case. We therefore share the Tribe's disappointment—as evidenced by the Tribe's filings in the federal district court seeking injunctive relief to enforce the declaratory judgment in the *Ute Indian*



*Tribe* case (see Resp. Br. 12)—that the State sought to reopen that issue in state court in this case and *Perank*.[8] Moreover, under the doctrine of collateral estoppel, the decision in the Tribe's favor in *Ute Indian Tribe* presumably would at least bar the State (in a case in which the defense was properly raised [9]) from prosecuting a member of the Tribe for a crime committed within any area the Tenth Circuit held to remain in the Reservation, because tribal members are in privity for present purposes with the Tribe. Cf. *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 468-469 n.7 (1976).

In the end, however, we do not believe that those considerations sufficiently distinguish the conflict here from the conflicts that led the Court to grant review in *Solem* and *DeCoteau*. The Tribe thus far has sought to prevent state prosecution only of tribal members for crimes committed in the disputed areas, and it is not clear in any event that the preclusive effect of the federal court judgment in *Ute Indian Tribe* would extend to anyone other than members of the Tribe. Accordingly, as the opinion in *Perank* suggests (see Resp. Br. App. 7a n.3), the judgment in *Ute Indian Tribe* probably would not be given the effect in the Utah state courts of barring prosecutions

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[8] By order dated December 17, 1992, the federal district court in the *Ute Indian Tribe* case deferred ruling on the Tribe's motion for an injunction to enforce the declaratory judgment in that case until April 14, 1993, in light of the pendency of the certiorari petition in this case. In doing so, the district court expressed the view that it would await this Court's disposition of the petition raising the jurisdictional issue in this case. Slip op. 3.

[9] The defense of collateral estoppel apparently was not raised in *Perank*. See Resp. Br. App. 7a-8a & n.3.

of *non-Indians* who commit crimes against Indians (which would be within exclusive federal jurisdiction under 18 U.S.C. 1152 if the areas in question remain part of the Reservation). It probably also would not be given the effect of barring prosecutions of Indians who are not members of the Tribe. Finally, as the Utah Supreme Court pointed out (Resp. Br. App. 8a n.3), the diminishment/jurisdictional issue can arise in civil cases to which the State and counties are not parties, and in which the doctrine of collateral estoppel therefore would not be applicable. In fact, *Brough* v. *Appawora*, 553 P.2d 934 (Utah 1976), vacated, 431 U.S. 901 (1977), was such a case. Accordingly, we do not urge the Court to deny review because of the possibility of a collateral estoppel bar in some future cases.[10]

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[10] The Court invited the Solicitor General to file a brief when the State of Utah filed a certiorari petition seeking review of the judgment of the Tenth Circuit in *Ute Indian Tribe* holding that the Reservation had not been diminished. We took the position that consideration of the question was not warranted at that time, because the Utah Supreme Court had not considered the question in light of *Solem*, but we suggested that review would be appropriate if that court adhered to its view in a future case. Gov't Br. at 14-15, *Utah* v. *Ute Indian Tribe*, No. 85-1821 (O.T. 1986). Because the Utah Supreme Court has adhered to that view (previously articulated in *Brough* v. *Appawora*, *supra*) in the face of *Solem* and the decision of the Tenth Circuit, we believe that plenary review is now appropriate.



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM C. BRYSON
*Acting Solicitor General*

MYLES E. FLINT
*Acting Assistant Attorney General*

EDWIN S. KNEEDLER
*Assistant to the Solicitor General*

RONALD J. MANN
*Assistant to the Solicitor General*

MARTIN W. MATZEN
EDWARD J. SHAWAKER
KATHERINE L. ADAMS
*Attorneys*

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# Supreme Court of the United States
OCTOBER TERM, 1992

ROBERT P. HAGEN,
*Petitioner,*
v.
STATE OF UTAH,
*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of the State of Utah**

## BRIEF FOR DUCHESNE COUNTY AND UINTAH COUNTY, UTAH, AS AMICI CURIAE IN SUPPORT OF RESPONDENT STATE OF UTAH

HERBERT WM. GILLESPIE
Duchesne County Attorney
P.O. Box 206
Duchesne, Utah 84021
(801) 738-2435

JOANN B. STRINGHAM
Deputy Uintah County Attorney
152 East 100 North
Vernal, Utah 84078
(801) 781-0770

TOM D. TOBIN
*Counsel of Record*
TOBIN LAW OFFICE, P.C.
P.O. Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED

In light of conflicting decisions by the Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit, whether the language of the Uintah Act of May 27, 1902 (32 Stat. 245), as amended, providing that the unallotted lands of the original Uintah Indian Reservation shall be restored to the public domain, constituted clear language of disestablishment, as this Court has recognized, so as to confer criminal jurisdiction upon the State of Utah over offenses involving Indians within the area so restored to the public domain.

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## INTEREST OF AMICI CURIAE

The concern that prompts the filing of this Brief can be simply stated. Prior to the recent litigation of this reservation boundary issue, this Court, the United States and the Tribe itself had taken the position that the Ute Tribe's reservation consisted of 1 million acres, not the 4 million acres encompassed within the boundaries of the original Uncompahgre and original Uintah reservations. More than 18,000 residents of Duchesne County and Uintah County thus face the prospect of being suddenly thrust into the status of residents of an Indian reservation, where their officials would have only limited jurisdiction and where they would have no elective voice in the governance of their affairs and property by the Tribe. For its part, the Ute Tribe has already enacted a comprehensive Tribal Code which, by its terms, is applicable to Indians and non-Indians alike throughout both historic reservation areas. *See, e.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). For those additional reasons, *amici* specially support the Brief of Respondent State of Utah in Support of Petition for Writ of Certiorari.

Compared to *Solem v. Bartlett*, 465 U.S. 463 (1984), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Mattz v. Arnett*, 412 U.S. 481 (1973), or *Seymour v. Superintendent*, 368 U.S. 351 (1962), more people, more area and more resources are at stake here because of the conflicting decisions of the Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit.

## SUMMARY OF ARGUMENT

The Utah Supreme Court correctly concluded that the Uintah Act of May 27, 1902 (32 Stat. 245), as amended, which provided that the unallotted lands of the Uintah Reservation be restored to the public domain, constituted clear evidence of disestablishment, as this Court has recognized. In a conflicting opinion, the *en banc* majority of the court of appeals mistakenly believed that this

Court's decision in *Solem* dictated "a different result," despite the fact that in *Solem* the Court indicated that it was following a path clearly marked by its prior decisions. As a result, the *en banc* majority failed to take into account important factors uniformly understood to constitute explicit expressions of congressional intent to disestablish both the original Uintah and the original Uncompahgre Reservation. Moreover, the *en banc* majority ignored the unwavering position of the United States since 1897 that the original Uncompahgre Reservation no longer exists and paid little attention to the similarly long-standing administrative and congressional treatment of the original Uintah Reservation. In construing operative public domain language as it did, the *en banc* majority thus attempted to "remake history," which this Court admonished "cannot" be done in order to resurrect reservations that long ago ceased to exist. *DeCoteau*, 420 U.S. at 449; *accord Rosebud*, 430 U.S. at 615.

## ARGUMENT

1. In 1986, after the *en banc* majority of the court of appeals in *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), (Resp. App. 76a-137a), just fashioned the second largest Indian reservation in the country, encompassing a 90 percent non-Indian population and three million acres of non-Indian owned lands (the one million acre reservation where nearly all tribal members live was never in dispute), the United States as *Amicus Curiae* suggested that this Court wait to grant review. According to the United States, there would be time enough to grant review if the Utah Supreme Court should adhere to its prior view in some future case. Brief for the United States *Amicus Curiae* at 14-15, *Utah v. Ute Indian Tribe*, United States Supreme Court No. 85-1821 (November 1986). This Court waited, and in *State of Utah v. Hagen*, —— P.2d ——, 191 Utah Adv. Rep. 26 (1992) (Resp. App. 1a-3a), and *State of Utah v. Perank*, —— P.2d at ——, 191 Utah Adv. Rep. 5 (1992) (Resp. App. 4a-75a), the Utah



Supreme Court did just what the United States thought it might. After inviting the United States and the Ute Indian Tribe to express their views, the Utah Supreme Court reviewed the entire record (which included all briefs) submitted in *Ute Indian Tribe* and disagreed with the *en banc* majority of the court of appeals. In the process, the Utah Supreme Court specifically noted:

> This Court invited the United States Department of Justice to file an amicus curiae brief in this case because of the importance of the issue of the location of the boundaries of the Uintah-Ouray Indian Reservation . . . The Department of Justice submitted to this Court a copy of the amicus brief it filed for the United States opposing the State's petition for certiorari in *Ute Indian Tribe*. In that brief, the Department stated, inter alia, that the issues presented in the petition for a writ of certiorari did not require review by the Supreme Court at that time *because* they could be addressed in a later case if the Utah Supreme Court were to disagree with the Tenth Circuit.

*Perank*, Resp. App. 6a (emphasis added).

As a result, an important question in federal law has now been decided by the Utah Supreme Court and the court of appeals in a way that underscores the conflicting decisions. And now is the time for this Court to authoritatively resolve this conflict.

Squarely at issue here is the Uintah Act of May 27, 1902, 32 Stat. 245, as amended, one in the series of surplus land statutes Congress passed between 1887 and 1920 when land areas once set aside as Indian reservations were opened for settlement pursuant to § 5 of the General Allotment Act of 1887, 24 Stat. 388. In the last thirty (30) years, this Court has addressed these difficult and complex questions a number of times to resolve similar conflicts and make clear important points of law. *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*,

368 U.S. 351 (1962). The limited historical perspective of *Seymour* and *Mattz* (no disestablishment intended) was broadened considerably in *Rosebud* and *DeCoteau* (disestablishment intended), and *Solem* confirmed, while the end result could vary, congressional intent would always control. The Utah Supreme Court decided the issue within the guidelines of this precedent but the *en banc* majority did not.

In *Ute Indian Tribe*, the *en banc* majority's conclusion that *Solem* "dictates" a different result with respect to the crux of this case, i.e. the significance of operative public domain terminology, is explicitly stated:

> The original expression 'return to the public domain' does *not* reliably establish the clear and unequivocal evidence of Congress's intent to change boundaries. *Solem*, 104 S.Ct. at 1166 [majority opinion].
>
> Our *conclusion* is that the phrase 'restore to the public domain' is *not* the same as a congressional state of mind to disestablish [majority opinion].
>
> Although the district court and the panel viewed this as language of cession, I believe that *Solem dictates* a different result [concurring opinion].
>
> Prior to *Solem*, 'public domain' language could have been construed as more conclusive evidence of disestablishment; following *Solem*, the term must be viewed as *ambiguous* in portent . . . [concurring opinion].
>
> Ultimately, I interpret *Solem* to *hold* that 'public domain' language standing alone is *insufficient* to support a finding of explicit congressional intent to disestablish [concurring opinion].

*Ute Indian Tribe v. Utah*, Resp. App. 86a-87a, 92a-93a (emphasis added).

And the extent to which the *en banc* majority departed from the principles set forth by this Court is specifically supported in a subsequent decision by a different panel of the court of appeals, as specifically noted by the Utah Supreme Court. *Pittsburgh & Midway Coal Mining Co.*



*v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 581 (1990). *See* Resp. App. 24a-27a.

The Utah Supreme Court could have also noted that the *en banc* majority opinion was further undermined by a subsequent admission of the United States:

> "In the end, however, the court of appeals' analysis [on Uncompahgre] is *unconvincing* . . . the court of appeals *erred* in holding that the Uncompahgre Reservation was not disestablished . . . ."

Brief for the United States as *Amicus Curiae* at 18, 20, *Utah v. Ute Indian Tribe*, U.S. Supreme Court No. 85-1821 (November 1986) (emphasis added).[1]

The United States maintained, on the other hand, that the same analysis of similar documentation in the same opinion by the same *en banc* majority was essentially sound with respect to the original Uintah Reservation. Even the United States could not explain how the *en banc* majority could, consistent with this Court's precedents, resurrect a two million acre reservation when that reservation ended in 1897, and has not been treated as an Indian Reservation by the Department of the Interior or any other federal agency since then. And even the most sophisticated argument can not cover up the glaring inconsistencies inherent in such a position—especially to the extent that the Uncompahgre Acts are *in pari materia* with the Uintah Acts. *See, e.g., Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). Properly construed, the Uncompahgre disestablishment indicia, all of which was substantially ignored by the *en banc* majority, was also present in the Uintah documents. It should have reinforced the conclusion that the original Uintah Reservation was similarly disestablished. Blinded by a fundamental misreading of *Solem*, the *en banc* majority missed its usual way in *both* instances, and the Utah Supreme Court was not remiss in

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[1] This is a significant admission because in this Court the United States has previously, without exception, argued against reservation disestablishment. *See*, n.12, *infra*.

refusing to following the same path. For this reason, a limited review of the Uncompahgre documentation is both appropriate and informative, even if the area itself is not directly at issue here.[2]

2. The original Uncompahgre reservation, created by Executive Order of January 5, 1882 (I Kappler 901) (LD 12), encompassed more than 1.9 million acres, nearly all of which is in Uintah County.[3] In the Act of August 15, 1894, ch. 20, 28 Stat. 286, 337-338 (LD 35), Congress directed that when a Presidential commission determined which lands would remain after allotments to the Uncompahgre Indians, those unallotted lands "shall, by proclamation, be restored to the public domain. . . ."[4] Three years later, pursuant to the Act of June 7, 1897 (30

[2] The *en banc* majority reestablished the original boundaries of both reservations. The offenses in *Hagen/Perank* occurred in the town of Myton, Utah, within the original boundaries of the Uintah reservation and, for the most part, the Utah Supreme Court limited its opinion to this area. (The Utah Court did question the reservation status of the one million acre addition to the Uintah National Forest (1905 Proclamation of President Roosevelt, 34 Stat. 3116) which according to the *en banc* majority is now also within the Uintah reservation (the district court and the panel agreed it was not). Resp. App. at 62a, n.28. Until 1977, the United States Department of Agriculture, Forest Service, agreed with the district court and the panel. See *Amici* App. B at 25a-29a.)

[3] The record on appeal includes a Joint Compendium of Legislative Documents and Joint Exhibits, which include Executive Orders, Presidential Proclamations and certain Secretarial Orders, complied and used by the District court. In addition to formal citation form, these sources are referred to parenthetically by their corresponding index numbers, LD 1 to LD 217, and JX 1 to JX 485. *See Ute Indian Tribe*, 773 F.2d at 1094, n.2, and *Ute Indian Tribe*, 521 F. Supp. at 1080, n.17.

[4] Importantly, the same Act directed the commission to:

> Also negotiate and treat with the Indians properly residing upon the *Uintah* Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severality to said Indians.

28 Stat. at 337, Sec. 22 (emphasis added).



Stat. 62, 87) (LD 49), implementing the 1894 Act, approximately 12,500 acres within this area (or less than 1 percent of the original Uncompahgre Reservation) were allotted, while the remaining lands were thereafter treated as "restored to the public domain," as the Commissioner of Indian Affairs stated.[5]

There was a clear continuity of purpose between the 1894 Act containing operative public domain language (28 Stat. 337) and the 1897 Act, which mandated the opening of the original Uncompahgre reservation (30 Stat. 87). *See* Resp. App. 118a-119a. The legislative history of the 1897 Act shows that the purpose of this provision was to carry forth and implement the 1894 Act. It shows as well that the purpose remained disestablishment. The *en banc* majority did not explain how, in the face of this legislative history, Congress could have intended the original Uncompahgre reservation to remain intact. More than that, the *en banc* majority failed even to discuss the matter. (*See* Resp. App. 85a-90a.).

The record also shows that, after the opening in 1898, there was "a widely held, contemporaneous understanding . . ." (*Solem*, 465 U.S. at 471), that the Uncompahgre reservation had been disestablished. Again, the *en banc* majority does not discuss the fact that officials of the Department of the Interior immediately began to refer to and treat the area as the "former" or "late" reservation.[6] The record also reveals a firm understanding that the unallotted lands were "restored to the pub-

[5] *E.g.*, [1899] Commissioner of Indian Aff. Rept. at 543 (JX 117); [1911] Commissioner of Indian Aff. Rept. at 92 (JX 353).

[6] *See, e.g.*, [1898] Commissioner of Indian Aff. Rept. at 43 (JX 108); [1899] Commissioner of Indian Aff. Rept. at 43, 351-52 (JX 117); Letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated April 12, 1899 (JX 113); H.R. Doc. No. 33, 58th Cong., 1st Sess., at 1, 2 (1903) (letters of the Secretary and Commissioner); Letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated July 27, 1903 (JX 168).

lic domain."[7] Because these materials contain unambiguous expressions of disestablishment by government officials responsible for implementing federal Indian policy, they constitute authoritative, contemporaneous statements reflecting the intent of Congress. *See, e.g., Rosebud*, 430 U.S. at 602-03.

Moreover, the *en banc* majority failed to take into account contemporaneous legislation treating the original Uncompahgre reservation as having ended. The Act of March 1, 1899 (LD 61), for example, described the area as the "former Uncompahgre Indian Reservation." 30 Stat. 940. Because this provision was passed by the same Congress which enacted the 1897 Act (*viz.*, the 55th Congress), it constitutes compelling evidence of a congressional intent to disestablish. *See Rosebud*, 430 U.S. at 603 n.25 (significance attributed to similar legislation passed shortly after the subject act "by the same Congress. . .").

Finally, the *en banc* majority said nothing about the unwavering position of the Department of the Interior since 1897 that the original Uncompahgre reservation no longer exists, a position the federal government has taken in this Court. Memorandum for the Petitioner in Response to the Motion of the Ute Indian Tribe, at 6, *Andrus v. Utah*, 446 U.S. 500 (1980). (No. 78-1522) (September 25, 1979) [hereinafter Federal Government Memorandum in *Andrus v. Utah*]. Nor did the *en banc* majority opinion address the 1948 Act (62 Stat. 72) (LD 187)—the Hill Creek Extension—extending what was then the Tribe's existing reservation to include lands situated within the original Uncompahgre reservation, which, in the words of the Solicitor General, would have constituted "a futile act if the latter Reservation still subsisted. . . ." Federal Government Memorandum in

[7] [1899] Commissioner of Indian Aff. Rept. at 543 (JX 117); [1900] Commissioner of Indian Aff. Rept. at 615 (JX 123); [1901] Commissioner of Indian Aff. Rept. at 669 (JX 154); [1904] Commissioner of Indian Aff. Rept. at 564 (JX 198).



*Andrus v. Utah*, *supra*, at 5.[8] In the 1948 Act itself, Congress once more referred to the historic Uncompahgre reservation in the past tense, that is, as the "former" reservation. 62 Stat. 77 (§ 2). Moreover, "nothing since 1948 indicates any Congressional change of mind . . ." Federal Government Memorandum in *Andrus v. Utah*, *supra*, at 5.

Given its constancy, this long standing administrative and congressional treatment was entitled to considerable weight. But there it was given none, contrary to *Rosebud's* instruction that:

> the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the "jurisdictional history."

430 U.S. at 604.

As to this part of the region—the original Uncompahgre reservation—the *en banc* majority thus contradicted the federal government's position, taken in this Court, that the reservation ended in 1897, and has not been treated as an Indian reservation by the Department of the Interior or any other federal agency since then. Indeed, the Uncompahgre Utes, alleging that they had "lost the reservation," recovered money damages against the United States, as the government told this Court. See Petition, at p.7, in *Ute Indian Tribe v. United States*, 14 Ind. Cl. Comm. 707 (1965) (that the Uncompahgre Band of Utes "have lost the reservation set aside for their use," that the federal government "refused to provide any reservation for said Indians," and that the government did not maintain the original "Uncompahgre Reservation in Utah as a reservation.").

In *Andrus v. Utah*, 446 U.S. 500 (1980), the Ute Tribe had moved to intervene on the basis that the lands

[8] The concurring opinion at least acknowledges that the 1948 Act seems "irreconcilable with continued reservation status." Resp. App. 100a.

involved were within the original Uncompahgre reservation and that this reservation had not been disestablished. The Solicitor General opposed the Tribe's intervention on the basis that:

> The fact is that, for several decades at least, the Department of the Interior has considered the Uncompahgre Reservation as disestablished. That remains its view today. Our own review of the evidence affords no basis for disagreeing with that conclusion. . . .

Federal Government Memorandum in *Andrus v. Utah*, at 6. Among other factors, the Solicitor General pointed out that "Congress treated the Uncompahgre Reservation as a mere temporary asylum for the Ute Band of that name," "in 1965, the Ute Tribe obtained a stipulated judgment in the Indian Claims Commission to compensate it for the failure of the United States to provide the Uncompahgre Band with a permanent Reservation (*Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, 14 Ind. Cl. Comm. 707)," and "at no time since 1897 does it appear that the Department of the Interior (or any other government agency) has treated the Reservation as still in existence." *Id.* at 4-5. Moreover, the Solicitor General informed this Court that "the historic evidence *compels* the conclusion that the Uncompahgre Reservation no longer subsists." *Id.* at 5 (emphasis added).

There is more. The United States answered the Tribe's petition in the Indian Claims Commission by stating that with respect to the original Uncompahgre reservation—which the Tribe itself alleged had been disestablished—the Tribe "suffered no loss by the *restoration to the public domain* . . . of the unallotted lands within the area. . . ." Answer of the United States, at p.17 (March 9, 1954), in *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 349, 14 Ind. Cl. Comm. 707 (1965) (emphasis added). Assuming the restored-to-the-public domain provision of the 1894 Act was implemented by the 1897 Act, the *en banc* majority's point instead was that *Solem* altered the settled rule that



such language constituted a clear and unequivocal expression of disestablishment. It is on that point that the *en banc* majority erred and rendered a decision in conflict with the decisions of this Court, the lower federal courts, and now the Utah Supreme Court. Moreover, it is readily apparent that this fundamental misconception distorted the perspective from which the Uintah documents should have been viewed.

3. The Brief of Respondent in Support of Certiorari sets forth in a concise manner the general arguments that clearly demonstrate that the Utah Supreme Court was correct in its analysis of the Uintah Act, as amended, and in its conclusion—and there is no need to repeat them here. Brief of Resp. at 13-26. Even a brief summary of some of the more specific Uintah references in support of this conclusion keeps the issue in the proper historical perspective. It also reinforces the position that had the *en banc* majority not been so blinded by misreading *Solem*, it could not have ignored the combined weight of Uintah documentation. The opinion of the district court, *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1111-1150 (D. Utah 1981), the panel of the court of appeals, *Ute Indian Tribe v. State of Utah*, 716 F.2d 1298, 1307-1313 (10th Cir. 1983), and the dissenting *en banc* opinion of Judge Seth at 773 F.2d at 1108-1114 (Resp. App. 105a-137a), recount and reflect this perspective. And nothing in *Solem* or any other opinion of this Court even suggests that it could be so easily discounted, as the *en banc* majority incorrectly assumed.

We start, without argument, with the general proposition, as stated in H.R. Rep. No. 791, 50th Cong., 1st Sess. (1888) (LD 15): "[t]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it . . . ." *Id.* at 3: *See e.g.* T. Donaldson, *The Public Domain, Its History, with Statistics* (1884) 240-248. Congress passed the Uintah Act of May 27, 1902, 32 Stat. 245 (LD 82), with this operative public domain language expressly

stated. And prior to the passage of the 1903 Uintah Act, an amendment was proposed to the appropriations bill which provided money for the resurveying of portions of the southern and western boundaries of the Uintah Indian Reservation. 36 Cong. Rec. 1387 (LD 90). Congressman Sutherland of Utah, later to become United States Supreme Court Justice Sutherland, objected to the amendment on the basis that it would *not* serve any useful purpose. In taking this stance, Congressman Sutherland made the following remarks:

> If the Uintah Reservation is opened, which I believe it will be, this appropriation . . . for reestablishing the boundary lines of the reservation *is entirely useless*. The boundary lines have been in their present condition for many years, and if by any mischance the reservation should not be opened it will not hurt to let it wait for another year; and if the reservation is opened it is simply an appropriation . . . *without any useful purpose whatever*. . . .

36 Cong. Rec. 1388 (LD 90) (emphasis added).

Moreover, the Congressman also stated that "[t]he reservation will be *simply restored to the public domain*." *Id.* (emphasis added). The effect that the 1902 Act was intended to have on the boundaries of the Uintah Reservation was neither questioned nor disputed; in fact, the amendment which was the focus of Congressman Sutherland's remarks was apparently rejected on that basis. *See id.*

By letter dated April 27, 1903 (JX 159), the then Acting Commissioner of Indian Affairs directed United States Inspector James McLaughlin to go to Utah, explain the legislation to the Ute Tribe and obtain the consent of the Uintah and White River Utes to the allotment of their lands.[9] The instructions contained in that letter made clear that allotments were to be made and

[9] James McLaughlin was the same United States Indian Inspector who conducted the 1901 and later negotiations with the Rosebud Indians involved in *Rosebud Sioux Tribe* v. *Kneip*, *supra*, 430 U.S. at 590, 606-07, & 610.



that the unallotted lands were to be restored to the public domain. *Id.* at 4-5. Moreover, the opening of the surplus lands for public entry and settlement was characterized as a "restoration to the public domain." *Id.*

Conferences with the Utes were conducted by Inspector McLaughlin from May 18 to May 23, 1903. *See* Minutes of Councils with Uintah and White River Indians at 34 (1903) (JX 162) (hereafter Transcript). Significantly, as the Utah Supreme Court noted, the Inspector pointed out:

> [E]ach of you will have a *boundary* to your individual holdings and there will also be a *border* to that 250,000 acre tract set aside for pasturage. . . .
>
> You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year there will be *no outside boundary line to this reservation.*

Transcript, at 42 (emphasis added). Resp. App. 37a.

The transcript also attests that the tribal members were well informed and understood the point exactly. *See, e.g.*, Transcript at 8-9, 12-22, 30, 32-33, 39-41, 45, 48, 53-56. For example, in the Council held on May 20, 1903, Wapsoch, a Uintah Ute, stated "[w]e do not want this *reservation line* changed in any way." Transcript, at 17 (emphasis added). Later, in the same Council, Red Cap, a White River Ute, confirmed this understanding:

> The Indians have understood what they have heard, and they hold this reservation, and they do not want any of it cut off. We want this *reservation line* to be just as it is. I hold it for my children, and I don't want to part with it. I have heard talk about selling before. . . .

Transcript, at 20 (emphasis added). And, in the Council held on May 22, 1903, Parank stated as follows:

> The Indians are talking about this *reservation line* that has been put here for along time, and they can-

> not understand why it is thrown aside. It was put down a long time ago. . . . Now they are trying to *throw it aside*. . . .

Transcript, at 56 (emphasis added).

After Inspector McLaughlin completed his report, Congress revisited the issue more than once because of delays in surveys and allotments. Again the public domain references were consistent and unequivocal. Several examples include:

> Hereby provided that so much of said lands as will be *restored to the public domain* shall be open to settlement and entry by proclamation of the President . . . And further provided, that for one year immediately following *the restoration of said lands to the public domain* said lands . . .

39 Cong. Rec. 1180 (1905) (LD 103) (emphasis added).

> *Provided*, That so much of said lands as *will be under* the provision of said acts *restored to the public domain* shall be open to settlement and entry by proclamation of the President . . .

39 Cong. Rec. 1180 (1905) (LD 103) (emphasis added).

> Representative Sherman. "[T]he amendment undertakes to do this: To *restore* this [the lands to be opened for settlement] to the *public domain* on the 10th of March. . . ."

*Id.* at 1183 (emphasis added).

> As the manner of opening Indian reservations to entry and settlement *after the lands are restored to the public domain* is a matter that comes within the jurisdiction of the General Land Office . . .

S. Rep. No. 4240, 58th Cong., 3d Sess. at 14-16 (1905) (LD 102), letter of the Commissioner of Indian Affairs contained in that Report (emphasis added).

The Utah Supreme Court recognized minor changes in the final Uintah amendments were not intended or understood to alter this basic proposition as it related to reservation disestablishment. Resp. App. 28a-43a.[10] The proclamation of President Roosevelt, dated July 14, 1905, confirms that the Utah Supreme Court was correct. 34 Stat.



[10] As the Utah Supreme Court explained, the 1905 congressional debate also addressed the "manner of such opening", *Perank*, Resp. App. 42a-43a. Because Congress could not have considered the issue in an historical vacuum, one would expect some congressional reference to precedent—and here the precedent cited was the 1904 *Rosebud* legislation (the same Act that the *Rosebud* court held reflected the base line purpose of *disestablishment* in the *Rosebud* legislation). *Rosebud*, 430 U.S. at 592-603.

> The provisions of this [Uintah] bill (Senate Bill 6867) prescribing the manner in which the lands are to be opened are similar to the provisions under which the *Rosebud Indian Reservation* in South Dakota, . . . .

S. Rep. 4240, 58th Cong. 3d Sess., 15-16 (1905) (LD 102) (emphasis added).

> Representation Sherman, The idea being to have such rules and regulations as were prescribed, for instance, in the *Rosebud* Reservation opening. . . .

39 Cong. Rec. 1181 (1905) (LD 103) (emphasis added).

> [w]hereas if the opening be by registration and drawing, as was done at *Rosebud*, . . . .

Letter from Secretary Hitchcock to the President, as contained in 39 Cong. Rec. 1184 (1905) (LD 103) (emphasis added).

Other sources confirm this justifiable expectation:

> As stated by Hon. W.A. Edwards, Commissioner General of the United States Land Office at Washington, D.C., it is quite certain that regulations similar to those governing the opening of the *Rosebud Reservation* in Dakota last year, will obtain at the opening of the Uintah Reservation in this state. . . .

Deseret Evening News, July 8, 1905, at 5 (JX 282) (emphasis added).

> Senator Smoot was pleased with the provisions of the reservation bill, . . . . The manner of opening the reservation will no doubt be the same as that employed at the *Rosebud reservation*. . . .

Deseret Semi-Weekly News, March 20, 1905, at 2, (JX 236) (emphasis added).

> The opening to settlement and entry under the homestead law of the *Rosebud Indian lands* . . . was successfully accomplished, . . . . *Equally* successful was the opening to settlement and entry under the homestead laws on August 28, 1905, of the

3119-20 (1905) (LD 108) (emphasis added). Resp. App. 44a-47a.

More than that, one year later, when President Roosevelt made an adjustment to compensate for an erroneous homestead entry on reserved lands, he expressly set forth in a 1906 Proclamation that the tract in question was then (1906) in the "*former* Uintah Indian Reservation in Utah" and it too was "*restored to the public domain*", as the Utah Supreme Court aptly pointed out. 34 Stat. 3228 (1906) (LD 132) (emphasis added). Resp. App. 47a-48a.

And this same understanding is repeatedly confirmed in nearly every source, time and time again, throughout the entire record of the subsequent history of both original reservations. Nothing in the briefs or records in *Seymour*, *Mattz*, *DeCoteau*, *Rosebud*, or *Solem* even approaches the consistency and force of this documentation.

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> unreserved and unallotted lands of the Uintah Indian Reservation in Utah, . . . .

Report of the Secretary of the Interior (1905) at 1495 (JX 328) (emphasis added).

> A *precedent* for the proposed [Uintah] legislation will be found in the granting of a similar privilege by the last Congress to homestead settlers upon certain lands which were *formerly* a part of the *Rosebud Indian Reservation*. . . .

S. Rep. 139, 59th Cong. 1st Sess. 2 (1906) (LD 117) (emphasis added).

> A *precedent* for the proposed [Uintah] legislation will be found in the granting of a similar privilege by the last Congress to homestead settlers upon certain lands which were *formerly* a part of the *Rosebud Indian Reservation*. . . .

H.R. Rep. 291, 59th Cong. 1st Sess. 2 (1906) (LD 119) (emphasis added).

A comprehensive thesis by the author of the study that figured prominently in the *Solem* opinion (*Solem*, 465 U.S. at 466 n.5, 477 n.21, 479 nn. 22 & 23, 480 nn. 24 & 25), expressly recognized that the Utah Uintah Act and others "followed the model" of the 1904 *Rosebud* Act. F. Hoxie, *Beyond Savagery: The Campaign To Assimilate The American Indians, 1880-1920* at 390 (Univ. Microfilms 1977).



fifteen pages of representative excerpts are set forth in *Amici* App. C.

This documentation reflects, in a variety of ways, precisely what the Commissioner of Indian Affairs at the time noted in his 1905 Annual Report when he described "the sale of the Ute lands *restored to the public domain*". [1905] Commissioner of Indian Aff. Rep. at 147 (JX 323) (emphasis added). The following year, the Commissioner repeated the point in a letter to the Secretary of the Interior that the lands were "*restored to the public domain*" and that these lands were "*former reservation lands.*" 40 Cong. Rec. 3405 (1906) (emphasis added). As early as 1906, the State of Utah formally reached this same conclusion. In a 1906 Opinion of the Utah Attorney General quoted in the March 31, 1906 edition of the *Vernal Express*, Vernal, Uintah County, Utah, the Attorney General concluded that the 1864 Uintah Reservation was no longer an existing reservation because it had become "*a part of the public domain*" and referred to it as a "*former*" Indian reservation. Appellees' Opening Brief, Add. F, *Ute Indian Tribe*, 716 F.2d 1298 (10th Cir. 1983) (emphasis added).

A decade later, the description was still the same. In a Report submitted to Congress in 1914 respecting the water rights of the Indians within the original Uintah Reservation, H.R. Doc. No. 1250, 63d Cong. 3d Sess. (September 9, 1914) (LD 149), the Secretary of the Interior stated that the surplus lands of that Reservation "*were restored to the public domain*" . . . and described the Uintah Reservation as the "*former*" Reservation. *Id.* at 2, 5 (emphasis added).

There is no question that this construction confirmed that the land was not within the boundaries of the original Uintah Reservation. In a letter to the Secretary of the Interior dated June 19, 1941 (JX 450), respecting the undisposed surplus lands of the original Reservation, the Commissioner of Indian Affairs described these lands as "lying within the *former boundaries* of the Uintah

and Ouray Indian Reservation . . . which lands were opened to entry under the Act of May 27, 1902 . . ., as amended." *Id.* at 1 (emphasis added). Later in a published Opinion of the Solicitor of the Department of the Interior dated January 27, 1947, 59 I.D. 393 (JX 454), it was noted: "Allotments were made . . ., and the balance of the lands [of the Reservation], with exceptions not here material, *were restored to the public domain* pursuant to the Act of May 27, 1902, as amended . . . ." *Id.* at 393 (emphasis added).

Until recently, not even the Ute Tribe disagreed with this conclusion. In fact, in 1957, the Ute Tribe and the United States so stated in related litigation in the Court of Claims, *Uintah and White River Bands of Ute Indians v. United States*, 139 Ct. Cl. 1 (1957). There, as the Utah Supreme Court stressed, they entered into a Stipulation, with which the Court of Claims agreed (139 Ct. Cl. at 5-6, 22), quoted the 1902 Act and then succinctly stated the critical point:

> "Pursuant to this [1902] Act and amendments thereto, more fully set out hereafter, allotments in severalty, aggregating 39,349.84 acres by 1905, were made to the Uintah and White River Indians, and surplus lands (with the exception of the forest reserve and reclamation withdrawals and certain mineral entries) *were restored to the public domain*, and opened for disposition under the public land laws for the benefit of the Indians."

*See* App. A to this Brief, at 1a-24a (emphasis added). Resp. App. 55a-56a. What is more, the United States (and the Ute Tribe) consistently and repeatedly maintained the original Uintah Reservation was a "*former*" reservation (*Amici* App. A, *infra*, at pp. 15a, 16a, 18a, 23a); and throughout its opinion and findings, the Court of Claims also treated the original Uintah Reservation as having ended. *E.g.*, 139 Ct. Cl. at 2, 25, 28, 56, 64, 69, 70.

This explains why, until recently, the Ute Tribe itself treated only the trust lands as the Tribe's post-1905 res-



ervation.[11] The Utah Supreme Court quoted with approval the manner in which the panel of the court of appeals relied on this acknowledgment. Resp. App. 56a. On rehearing, Judge Seth again observed:

> Statements made by the Utes themselves also tend to detract from their position. For example, the 1957 Ute Ten Year Development Program provides a description of the *total acreage of the Uintah and Ouray Reservation as currently containing 1,010,000 acres.*
> . . .

*Ute Indian Tribe*, Resp. App. 132a (Seth, J., dissenting) (emphasis added).

Thus, for more than half a century the lands "constituting" the Tribe's reservation were considered to be only those lands held in trust, as this Court itself recognized in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 141 (1972), in a different context.

Finally, in other decisions rendered in prior litigation, other courts routinely interpreted the 1902 Act, as amended, in a manner that supports all of the points noted above.[12] Indeed, in 1946, the Tenth Circuit expressly held in *Hanson v. United States*, 153 F.2d 162 (10th Cir. 1946)—a decision unaccountably ignored by the *en banc* majority (but not by the Utah Supreme Court)—that the unallotted and unreserved lands of the original Uintah Reservation were "*restored to the public domain by the Act of May 27, 1902. . . .*" *Id.* at 163 (emphasis added). Resp. App. 59a.

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[11] *See, e.g.*, 1957 Ute Ten-Year Development Program, at 66-68 (JX 465); 1966 Review and Revision of the Uintah & Ouray Indian Reservation-Wide Program, at 7, 8; 1969 Annual Report of the Uintah Indian Tribe, at 1 (JX 473).

[12] *See Hanson v. United States*, 153 F.2d, at 162-63; *Uintah and White River Bands of Ute Indians*, 139 Ct.Cl., at 5-6 & 21-22; *United States v. Boss*, 160 F. 132, 132-33 (D. Utah 1906); *Sowards v. Meagher*, 108 P. 1112, 1114 (Utah 1910).

## CONCLUSION

For the foregoing reasons and the reasons stated in the Petition and the Brief of Respondent State of Utah, the petition for a writ of certiorari should be granted. In addition, it may be appropirate for the Court to invite the United States to express its views in this case.[13]

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[13] Two weeks after the Utah Supreme Court decided this issue, the Ute Indian Tribe filed for injunctive relief in the United States District Court of Utah seeking to enjoin the Utah Supreme Court from enforcing its decision (even though the Utah Attorney General had previously acknowledged publicly that no one would act on the decision until this Court had an opportunity to review a petition for writ of certiorari). Brief of Resp. at 12. This renewed federal litigation, in which *amici* are named defendants again, is now proceeding on a briefing schedule, and notwithstanding the objections of defendants, that schedule is on going while this Petition is pending. For this reason, additional resources would be conserved and further divisiveness avoided *if this Court acted favorably on the Petition at this time and then invited the United States to express its views on the merits.* Also, other cases such as *Roosevelt City v. Gardner*, Case No. 910532-CA, (Utah App. November 9, 1992). [Amici App. D at 45a-47a], would then be held in abeyance. *See*, Brief of Resp. at 12.

Since *Seymour* the Court has invited the United States to express its views prior to granting certiorari in each of the reservation boundary cases it has decided. See the Orders in *Solem v. Bartlett*, 460 U.S. 1035 (1983); *Rosebud Sioux Tribe v. Kneip*, 423 U.S. 1047 (1976); *DeCoteau v. District County Court*, 416 U.S. 966 (1974); *Mattz v. Arnett*, 409 U.S. 819 (1972); *Seymour v. Superintendent*, 368 U.S. 351, 352 (1962). (In all five cases, the United States contended that reservation status had not ended. See *Solem*, 465 U.S. at 464; *Rosebud*, 430 U.S. 584, 585; *DeCoteau*, 420 U.S. 425, 426 (1975); *Mattz*, 412 U.S. 481, 482; *Seymour*, 368 U.S. 351, 352 (1962)). Here the conflict is clear. And the United States has already submitted its views to this Court in *Ute Indian Tribe* and resubmitted those same views to the Utah Supreme Court:

> If the Utah Supreme Court nevertheless should adhere to its prior view in some future case, notwithstanding the intervening decision in *Solem* and the exhaustive consideration of the issue by the courts below, *there will be time enough for this Court to grant review.*

Brief for the United States as *Amicus Curiae* at 14-15, *State of Utah v. Ute Indian Tribe*, U.S. Supreme Court No. 85-1821 (November 1986) (emphasis added).



Respectfully submitted,

HERBERT WM. GILLESPIE
Duchesne County Attorney
P.O. Box 206
Duchesne, Utah 84021
(801) 738-2435

JOANN B. STRINGHAM
Deputy Uintah County Attorney
152 East 100 North
Vernal, Utah 84078
(801) 781-0770

TOM D. TOBIN
*Counsel of Record*
TOBIN LAW OFFICE, P.C.
P.O. Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500

November 18, 1992

# APPENDICES

# APPENDIX A

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No. 47569
No. 47570

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THE UINTAH AND WHITE RIVER BANDS OF UTE INDIANS,
*Plaintiffs,*

v.

THE UNITED STATES OF AMERICA,
*Defendant.*

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## STIPULATION

Filed January 4, 1954

IN THE UNITED STATES COURT OF CLAIMS

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No. 47569

No. 47570

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THE UINTAH AND WHITE RIVER BANDS OF UTE INDIANS,
*Plaintiffs,*

v.

THE UNITED STATES OF AMERICA,
*Defendant.*

---

## STIPULATION

It is agreed between the parties, in the above-captioned cases, for the purpose of these cases and no other purpose, as follows:

1. In pre-white times, Indians who have since come to be known as Utes, Southern Paiutes, and Shoshones lived within the territory now included in the State of Utah.

2. By Executive Order of October 3, 1861, (I Kappler 900) the "Uintah Valley" was "reserved to the United States and set apart as an Indian reservation." In the absence of an authorized survey, the area set apart was described as follows:

> ". . . the entire valley of the Uintah River within Utah Territory, extending on both sides of said river to the crest of the first range of contiguous mountains on each side . . ."

The lands which are involved in the above-captioned cases are within the area so described. A copy of the said



Executive Order is appended hereto (Appendix A) and incorporated by reference.

3. By an Act of May 5, 1864, (13 Stat. 63) it was provided

> ". . . That the superintendant of Indian affairs for the Territory of Utah be, and he is hereby, authorized and required to collect and settle all or so many of the Indians of said territory as may be found practicable in the Uintah Valley, in said territory, which is hereby set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same."

A copy of the said Act is appended hereto (Appendix B) and incorporated by reference.

4. By an Act of February 23, 1865, (13 Stat. 432) ". . . to Extinguish The Indian Title to Lands In The Territory of Utah Suitable For Agricultural And Mineral Purposes [,]" the President was authorized and directed to enter into treaties with the various tribes of Indians of Utah Territory, providing for the surrender of their possessory right to all such lands, except such part as might be set apart for reservations. A copy of the said Act is appended hereto (Appendix C) and incorporated by reference.

5. Pursuant to the Act of February 23, 1865, treaties were negotiated with the "Pie-ede or Pah-Ute" Indians on September 18, 1865 (unpublished), the "Weber Ute" on October 30, 1865, (5 Kappler 698), and various groups of "Utah" Indians on June 8, 9, and 10, 1865 (5 Kappler 695). None of the said treaties was ever ratified.

6. The Indian parties to the treaty negotiated on June 8, 9, and 10, 1865, commonly referred to as the Spanish Fork Treaty, were designated therein as the ". . . Utah, Yampah Ute, Pah-Vant, Sanpete Ute, Tim-p-nogs and

Cum-nm-bah Bands of the Utah Indians occupying the lands within Utah Territory, . . ." The said treaty provided for the cession by said Indians of "all their possessory right of occupancy" to an area described therein, reserving a designated part thereof for their exclusive use and occupation as follows:

> "Art. II. There is however reserved for the exclusive use and occupation of the said tribes the following tract of lands; viz 'the entire valley of the Uintah River within Utah Territory extending on both sides of said river to the crest of the first range of contiguous mountains on each side' which said tract shall be, so far as is necessary, surveyed and marked out, set aside and reserved for their exclusive use and occupation nor shall any white person, unless he be in the employ of the Indian authorities, be permitted to reside upon the same, without permission of the said tribe, and of the Superintendent of Indian Affairs or United States Indian Agent. It is however understood that should the President of the United States hereafter see fit to place upon the reservation, any other friendly tribe or bands of Indians of Utah Territory, to occupy the same in common with those above mentioned, he shall be at liberty to do so.
>
> "Art. III. The said tribes and bands agree to remove to an settle upon the said reservation within one year after the ratification of this treaty, provided the means are furnished them by the United States to enable them to do so—In the meantime it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied if with the permission of the owner."

A copy of this unratified treaty is appended hereto (Appendix D) and incorporated by reference.



7. From time to time after 1865, various individuals and groups of Indians residing in Utah Territory, other than those who were in Uintah Valley at the time, moved into the area described in the Executive Order of October 3, 1861, and the unratified Spanish Fork Treaty of 1865, and set apart by the Act of May 5, 1864, *supra*. An Indian agency was established known as the Uintah Valley Agency, and the area became known as the Uintah Indian Reservation or the Uintah Valley Reservation. A substantial number of the said Indians, so located on the reservation, and their descendants since them have continued to live upon the reservation, have received individual allotments thereon pursuant to the Act of May 27, 1902, as amended (see paragraph 16 hereof), and are now all known as Uintah or Uintah Ute Indians. Since 1936 they have been a constituent group of the "Ute Indian Tribe of the Uintah and Ouray Reservation," an Indian Reorganization Act (48 Stat. 984) corporation, composed of Uintah, White River, and Uncompahgre Ute Indians.

8. On March 2, 1868, a treaty was concluded (and subsequently ratified and proclaimed, 15 Stat. 619) between the United States and Indian parties designated therein as "the Tabequache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Utes," "sometimes referred to thereafter as the "Confederated Bands of Ute Indians." Article II of the said treaty set apart a large reservation, wholly wihin the Territory of Colorado, for the use and occupation of the Indians therein named, and for such other friendly Indians as they might be willing to admit among them. By Article III the Indians, parties thereto, relinquished all claims and rights in and to any other territory not included within the reservation. Article IV provided for the establishment of two agencies upon the reservation, "one for the Grand River, Yampa, and Uintah bands, on White River, and the other for the Tabequache, Muache, Weeminuche, and Capote Bands on the Rio de los Pinos. . ."

The said agencies were established and Indians associated with the White River Agency in northwest Colorado came in time to be known as White River Utes or the White River Band of Ute Indians. A copy of the said treaty of 1868 is appended hereto (Appendix X) and incorporated by reference.

9. By an agreement, approved by the Act of June 15, 1880, (21 Stat. 199), with the "Confederated Bands of Ute Indians in Colorado," it was provided that the Indians would cede the then remaining portions of the Ute Reservation in Colorado. The agreement provided for stated considerations to the Indians and that reservations be established for them, as follows:

> "The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.
>
> "The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah.
>
> "The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

A copy of the said Agreement of 1880 is appended hereto (Appendix E) and incorporated by reference.

10. Pursuant to the Agreement and Act of June 15, 1880, supra, the White River Utes were removed to the Uintah Reservation beginning in about November of 1881.



Pursuant to the same Act and subsequent legislation they were given individual allotments on the Uintah Reservation, (see Paragraph 16 hereof). In general, the White River Ute Indians so removed to the reservation, and their descendants since them have continued to live upon the reservation and are a constituent group of the "Ute Indian Tribe of the Uintah and Ouray Reservation."

11. Pursuant to Section 2 of the Act of June 15, 1880, *supra*, a commission reported that it had examined the land on the Grand River near the mouth of the Gunnison, and had found insufficient suitable land for the Uncompahgre Utes. A tract of land in the valleys of the White and Green Rivers in Utah (south and east of the Uintah Reservation) was selected by the said commission and approved by the Secretary of the Interior for the settlement of the Uncompahgre Utes, who removed thereto by October 1881. The Uncompahgre Reservation in Utah was established by Executive Order of January 5, 1882, (I Kappler 901), a copy of which is appended hereto (Appendix F) and incorporated by reference.

12. An Act of May 24, 1888 (25 Stat. 157), a copy of which is appended hereto (Appendix G) and incorporated by reference, provided that a designated portion of the Uintah Valley Indian Reservation should be restored to the public domain and sold upon ratification by three-fourths of the adult-male Indians residing on the reservation. The Act provided further,

> ". . . That all moneys arising from the sales of this land shall belong to said Indians and be paid into the Treasury of the United States and held or added to any trust funds of said tribes now there."

Pursuant to this Act, lands were sold by the United States and receipts therefrom in the amount of $22,417.93 were credited to the benefit of the Uintah and White River Bands of Ute Indians. Pursuant to the Act of May 27, 1902, (32 Stat. 245, 263), as amended by the Joint

Resolution of June 19, 1902, (32 Stat. 744) (see paragraph 17 hereof), an additional $10,000 was appropriated and paid to the Uintah and White River Utes to cover claims for lands detached from the reservation pursuant to the Act of May 24, 1888, *supra.*

13. An Act of August 15, 1894 (28 Stat. 286, 337) a copy of pertinent portions of which is appended hereto (Appendix H) and incorporated by reference, directed the appointment of a commission (1) to make allotments in severalty to the Uncompaghre Indians within the reservation referred to in paragraph 11, with a provision that the Uncompaghres would be required to pay $1.25 per acre, for the lands so allotted, from out of the proceeds of the sale of their Colorado lands under the 1880 Agreement and Act; and (2) to "negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, . . ." The said commission was appointed but on January 8, 1895, reported that it had encountered difficulty in explaining to the Uncompaghres why they would be required to pay $1.25 per acre for their allotments, whereas the Indians on the Uintah Reservation would not be required to pay for their allotments. As a consequence, no allotments or agreements for cession of unallotted lands were made.

14. The Act of January 7, 1897 (30 Stat. 62, 87), the pertinent provisions of which are appended hereto (Appendix I) and incorporated by reference, directed the Secretary of the Interior to allot in severalty, to the Uncompahgre Ute Indians on the Uncompahgre Reservation, lands in the Uncompahgre Reservation, or the Uintah Reservation, or elsewhere in the State of Utah, and provided for the disposition of unallotted lands on the Uncompahgre Reservation under the public land laws. Pursuant to said Act, and the Act of June 4, 1898, (30



Stat. 429) (see paragraph 15 hereof), and the Joint Resolution of June 19, 1902 (32 Stat. 744) amending the Act of May 27, 1902 (32 Stat. 245, 263) (see paragraphs 16 and 17 hereof), Uncompahgre Indians were given allotments in severalty upon the Uncompahgre and Uintah Reservations, including ultimately 63,915.51 acres in allotments on the Unitah Reservation by 1905, and the unallotted portions of the Uncompahgre Reservation were opened for disposition under the public land laws. By the Act of May 27, 1902 (32 Stat. 245, 263), as amended by the Joint Resolution of June 19, 1902, (32 Stat. 744), (see paragraphs 16 and 17 hereof), the United States appropriated and paid to the Uintah and White River Utes, $60,064.48 which had been received from the Uncompahgres for allotments on the Uintah Reservation.

15. An Act of June 4, 1898, (30 Stat. 429) a copy of which is appended hereto (Appendix J) directed and authorized the President to appoint a commission to make allotments in severalty, with the consent of the Indians properly residing on Uintah Indian Reservation, "to the said Indians and to such of the Uncompahgre Indians as may not be able to obtain allotments within the Uncompahgre reservation," and also provided,

> "Sec. 2. That said commission shall also obtain, by the consent of a majority of the adult male Indians properly residing upon and having an interest in the said Uintah Indian Reservation, the cession to the United States of all the lands within said reservation not allotted or needed for allotment as aforesaid. The agreement for such cession shall be reported by said commission and become operative when ratified by Act of Congress; and thereupon such ceded lands shall be held in trust by the United States for the purpose of sale to citizens thereof: *Provided*, That the United States shall pay no sum or amount whatever for said lands so ceded. Said lands shall be sold in such manner and in such quantities and for such

prices as may be determined by Congress: *Provided*, That the amounts so received shall, in the aggregate be sufficient to pay said Indians in full the amount agreed upon for said lands. All sums received from the sales of said lands shall be placed in the Treasury of the United States for said Indians, and shall be exclusively devoted to the use and benefit of the Indians having interests in the lands so ceded.

16. The Act of May 27, 1902, (32 Stat. 245, 263), a copy of the pertinent portions of which is appended hereto (Appendix K) and incorporated by reference, provided for individual allotments and disposition of unallotted lands on the Uintah Reservation, as follows:

"That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unalloted lands within said reservation shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further*, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored



to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential rights to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

"Said item of seventy thousand and sixty-four dollars and forty-eight cents to be paid to the Uintah and White River Utes covers claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and for which the Government has received from said Uncompahgre Indians money aggregating sixty thousand and sixty-four dollars and forty eight cents; and the remaining ten thousand dollars claimed by the Indians under an Act of Congress detaching a small part of the reservation on the east and under which Act the proceeds of the sale of the lands were to be applied for the benefit of the Indians.

Pursuant to this Act and amendments thereto, more fully set out hereafter, allotments in severalty, aggre-

gating 39,349.84 acres by 1905, were made to the Uintah and White River Indians, and surplus lands (with the exception of forest reserve and reclamation withdrawals and certain mineral entries) were restored to the public domain, and opened for disposition under the public land laws for the benefit of the Indians. Substantial amounts of said surplus lands were sold, and $1,184,996.33 in proceeds from such sales was set up for the benefit of the Indians under an account headed "Proceeds of Uintah and White River Ute Lands." By Order of the Secretary of the Interior, August 25, 1945 (10 F.R. 12409), a copy of which is appended hereto (Appendix L) and incorporated by reference, all undisposed-of opened lands of the former Uintah Reservation were "restored to tribal ownership for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah. . ."

17. A Joint Resolution of June 19, 1902 (32 Stat. 744), a copy of the pertinent portions of which is appended hereto (Appendix M) and incorporated by reference, supplemented and modified the Act of May 27, 1902, *supra*. The Resolution provided that,

> "In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of livestock.
>
> "All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to each head of a family and forty acres to each other Indian, and no more. The grazing land selected and



> set apart as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named."

The Resolution also provided that the $70,064.48 previously appropriated by the Act of May 27, 1902, *supra*, in satisfaction of claims of the Uintah and White River Tribes of Ute Indians, as set forth in the Act (see paragraphs 12, 14, and 16 hereof), should be paid without awaiting the action of the Indians upon the program of allotments and disposition of unallotted and unreserved lands proposed by the Act of May 27, 1902, *supra*.

18. An Act of March 3, 1903 (32 Stat. 982, 997-8), a copy of the pertinent provisions of which is appended hereto (Appendix N) and incorporated by reference, provided,

> ". . . That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their land as directed by the Act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said Act: . . ."

19. The Act of March 3, 1905 § 33 Stat. 1048, 1069-1070), a copy of the pertinent provisions of which is appended hereto (Appendix O) and incorporated by reference, extended the time for opening the Uintah Indian Reservation, provided generally for the disposition of unreserved and unallotted lands under the general provisions of the homestead and town-site laws, the proceeds to be used for the benefit of the Indians, made other changes

in the provisions of the 1902 Act for the disposal of unallotted lands, and provided for reservation of forest lands and reservoir sites prior to opening, as follows:

> "That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the Act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided*, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the Act opening the reservation."

20. Pursuant to the authority granted by the Act of March 3, 1905, *supra*, approximately 1,010,000 acres of land within the Uintah Indian Reservation (more fully described hereafter) were added to and made a part of the Uintah Forest Reserve, by Proclamation of the President on July 14, 1905, (34 Stat. Pt. III 3116). A copy of said proclamation is appended hereto (Appendix P) and incorporated by reference. Quantities of timber were sold from time to time from off such lands prior to 1920, and, pursuant to the the Act of March 3, 1905, *supra*, $63,024.83 in proceeds therefrom was transferred to accounts for the benefit of the Indians, as follows: $62,724.83 to an account "Proceeds of Uintah and White River Ute Lands," and $300 to an account "Indian Moneys Proceeds of Labor, Uintah and Ouray Indians."



21. Pursuant to the authority granted by the Act of March 3, 1905, *supra*, approximtaely 93,000 acres of land in the Uintah Indian Reservation were reserved for "reservoir site necessary to conserve the water supply for the Indians, or for general agricultural development," by proclamation of the President on August 3, 1905, (34 Stat. Pt. III 3141). By Proclamation of August 14, 1905, the reservation was modified by excluding certain lands, thereby reducing the reservation to approximately 60,160 acres. The said Proclamations are appended hereto (Appendix Q) and incorporated by reference. By orders of May 13, 1907, and November 11, 1909, copies of which are appended hereto [Appendix R] and incorporated by reference, 56,868.51 acres of the 60,160 acres theretofore reserved by the above Proclamations, were withdrawn, by the Secretary of the Interior pursuant to Section 3 of the reclamation Act of June 17, 1902 (32 Stat. 388), for irrigation works for the Strawberry Valley project.

22. By the Act of April 4, 1910, (36 Stat. 269, 285), copy of the pertinent portions of which is appended hereto (Appendix S) and incorporated by reference, Congress extinguished "All right, title and interest of the Indians" in the "lands in the former Uintah Indian Reservation in the state of Utah, which were set apart by the President for reservoir and other purposes under the provisions of the Act approved March third, nineteen hundred and five, xxx and which were by the Secretary of the Interior withdrawn for irrigation works under the provisions of the reclamation Act of June seventeenth, nineteen hundred and two, in connection with the reservoir for the Strawberry Valley project." The area embraced within the above description constitutes 56,868.51 acres (see paragraph 21 hereof), more fully described in paragraph 26 hereof, and is the subject of the claim for just compensation in Docket No. 47570. The said Act of April 4, 1910, *supra*, appropriated $1.25 per acre for the lands thus taken to be paid from the reclamation fund "for the benefit of the Uintah Indians," subject to the

same disposition as the proceeds of sales of lands in the former Uintah Indian Reservation, and payable in five annual installments. Pursuant to this Act, $71,085.65 was paid into the Treasury under the fund "Proceeds of Uintah and White River Lands," in five equal installments of $14,217.13 on February 21, 1912, October 28, 1912, June 27, 1913, September 22, 1914 and February 25 1915, respectively. Under date of October 18, 1948, the Acting Commissioner of Indian Affairs, in response to a Call of this Court, reported that rentals or income from the said lands were collected between August 3, 1905, and April 4, 1910, and were paid or credited to plaintiffs, as follows: January, 1908, $10,408; September, 1908, $8,728; September, 1910, $9,945.88.

23. By an order of October 20, 1910, a copy of which is appended hereto (Appendix T) and incorporated by reference, six sections of unallotted lands within the former Uintah Indian Reservation were withdrawn from public entry, pursuant to the reclamation Act of June 17, 1902, *supra*, in connection with the Strawberry Valley reclamation project. The said lands are Sections 13, 14, 23, 24, 25 and 26, Township 4 South, Range 11 West, Uintah Special Meridian. Section 25 was within the area previously added to the Uintah National Forest by the Proclamation of March 3, 1905, *supra* (see paragraph 20 hereof). Sections 13, 14, 24, 25 and 26 were within the 60,160 acres set aside for reservoir and other purposes by the Proclamation of August 3, 1905, *supra* (see paragraph 21 hereof), and constitute the balance of that area not taken by the Act of April 4, 1910, *supra*, (see paragraph 22 hereof). Such right, title, and interest as plaintiffs may have had to the said Sections 13, 14, 23, 24, and 26 has not been (Tr. 184) extinguished, and no claim with reference to the said lands is included in either Docket No. 47569 or 47570. Said Section 25 was added to and made a part of the Uintah Forest Reserve by the Proclamation of July 14, 1905, *supra*, pursuant to the Act of March 3, 1905, *supra* (see paragraphs 19 and 20 hereof),



and the claim for just compensation based upon the said Section 25 is included in Docket No. 47569.

24. The Act of February 13, 1931, (46 Stat. 1092), a copy of which is appended hereto (Appendix U) and incorporated by reference, provided for payment for 973,777 acres of the 1,010,000 acres of land added to the Uintah National Forest on July 14, 1905 (see paragraph 20, *supra*), in the following terms:

> ". . . That there is hereby authorized to be appropriated the sum of $1,217,221.25 for payment, at the rate of $1.25 per acre, to the Uintah, White River, and Uncompahgre bands of Ute Indians in the State of Utah for nine hundred and seventy-three thousand seven hundred and seventy-seven acres of land belonging to such Indians being a part of the one million and ten thousand acres of land withdrawn from entry and sale by an Executive Order dated July 14, 1905, and included within the Uintah National Forest. Such sum shall be in full satisfaction of all claims of said Indians against the United States with respect to such lands and shall, when appropriated, be apportioned by the Secretary of the Interior among the said bands of Indians in such amounts as in his opinion the interests of said bands require: *Provided*, That as to the balance of said one million and ten thousand acres, amounting to thirty-six thousand two hundred and twenty-three acres, which has heretofore been classified as coal lands, the Secretary of the Interior shall proceed with all convenient speed to ascertain the value thereof and report his findings with respect thereto to the Congress not later than six months after the approval of this Act for such action as to the Congress shall seem appropriate. The amounts so apportioned, less the amount of the attorneys' fees determined as provided in section 2, shall be credited to such bands on the books of the Treasury Department, shall bear interest at the rate

of 4 per centum per annum and shall be disposed of in the same manner as now or hereinafter provided by law for the disposition of other funds belonging to said Indians."

Pursuant to said Act, $1,217,221.25 was set up on the books of the United States Treasury under the heading "Payment to Uintah, White River, and Uncompahgre Ute Indians of Utah for Lands." After payment of attorneys fees, $1,162,221.25 of said amount was transferred to the "Uintah, White River and Uncompahgre Ute 4% Fund, Utah", $1,146,319.50 of said funds was distributed *per capita* to the Uintah, White River, and Uncompahgre Bands of Ute Indians in the years 1935, 1936, and 1938. It is stipulated that for purposes of case No. 47569 Uncompahgre Indians received the benefit of $\frac{430}{1191}$ of the proceeds of the Act of February 13, 1931, *supra*.

25. The area of the former Uintah Reservation which was added to the Uintah National Forest by Proclamation of July 14, 1905, supra, and in payment for which $1.25 per acre was appropriated by the Act of February 13, 1931, *supra*, being the area for the taking of which just compensation is sought in No. 47569, constitutes 973,777 acres, and is described as follows:

Beginning at the northeastern most point of the former Uintah Indian Reservation; thence in a southerly direction down the eastern boundary of the said Reservation to the section line between Sections twenty-one (21) and twenty-eight (28), Township two (2) North, Range one (1) East, Uintah Meridian; thence westerly to the south-west corner of Section nineteen (19), Township two (2) North, Range one (1) West; thence northerly to the south-east corner of Section thirteen (13), Township two (2), North, Range two (2) West; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of Section twelve (12), said township;



thence westerly to the south-west corner of Section four (4), said township; thence northerly to the north-west corner of said section; thence westerly to the north-east corner of Section four (4), Township two (2) North, Range three (3) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence westerly to the north-east corner of Township one (1) North, Range six (6) West; thence southerly to the south-east corner of Section thirteen (13), said township; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of said section; thence westerly to the south-west corner of Section eleven (11), said township; thence northerly to the north-west corner of said section; thence westerly to the north-east corner of Section eight (8), said township; thence southerly to the south-east corner of Section seventeen (17), said township; thence westerly to the north-east corner of Section twenty-one (21), Township one (1) North, Range nine (9) West; thence southerly to the south-east corner of said section; thence westerly to the south-west corner of Section nineteen (19), said township; thence southerly along the range line, allowing for the proper offset on the Base Line, to the north-west corner of Section eighteen (18), Township one (1) South, Range nine (9) West; thence easterly to the north-east corner of Section sixteen (16), Township one (1) South, Range eight (8) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence westerly to the north-east corner of Section four (4), Township two (2) South, Range ten (10) West; thence southerly to the south-east corner of Section sixteen (16), said township; thence westerly to the south-west corner of Section eighteen (18), said township; thence southerly to the south-east corner of Township two (2) South, Range eleven (11) West; thence westerly to the south-west corner of Section thirty-three (33), said township; thence northerly to the south-east corner of Section twenty (20),

said township, thence westerly to the south-west corner of said section, thence northerly to the south-east corner of Section seven (7), said township; thence westerly to to the south-west corner of said section; thence northerly to the north-west corner of said township; thence westerly to the north-east corner of fractional Section four (4), Township two (2) South, Range twelve (12) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence easterly to the north-east corner of Section three (3), Township three (3) South, Range twelve (12) West; thence southerly to the south-east corner of said section; thence easterly to the north-east corner of Section eleven (11), said township; thence southerly to the south-east corner of said section; thence easterly to the north-east corner of Section thirteen (13), said township; thence southerly to the south-east corner of Township four (4) South, Range twelve (12) West; thence easterly to the south-west corner of Section eleven (11) West; thence northerly to the north-west corner of said section; thence easterly to the south-west corner of Section twenty-five (25), said township; thence northerly to the north-west corner of said section; thence easterly to the north-east corner of Section thirty (30), Township four (4) South, Range ten (10) West; thence southerly to the south-east corner of Section thirty-one (31), said township; thence easterly to the south-west corner of Township four (4) South, Range nine (9) West; thence northerly to the north-west corner of Section thirty (30), said township; thence easterly to the north-east corner of Section twenty-five (25), said townhsip; thence southerly to the south-east corner of said township; thence easterly to the north-east corner of Section five (5), Township five (5) South, Range eight (8) West; thence southerly to the south-east corner of Section seventeen (17), said township; thence westerly to the south-west corner of Section eighteen (18), said township; thence southerly to the south-east corner of Section twenty-four (24), Township five (5) South, Range nine (9) West; thence westerly to the north-east corner of Section twenty-eight (28), said township; thence southerly to the south-east corner of said section; thence westerly to the south-west corner of Section twenty-nine (29), said township; thence southerly to the north-west corner of Section twenty-nine (29), Township six (6) South, Range nine (9) West; thence easterly to the south-west corner of Section twenty-one (21), Township six (6) South, Range eight (8) West; thence northerly to the north-west corner of Section four (4), said township; thence easterly to the eastern boundary of the Uintah Indian Reservation; and thence along the said Indian Reservation boundary, first in general southwesterly, then a westerly, then a northwesterly and north, and then an easterly direction back to the point of beginning;



Excepting therefrom approximately 36,223 acres, classified as coal lands, and more particularly described as follows:

Township 1 south, range 8 west, Uintah meridian, Utah: North half, and the north half of the south half of section 16; section 17; lots 2, 3, and 4, and the southeast quarter of the northwest quarter, and the east half of the southwest quarter, and the northeast quarter of the northeast quarter, and the south half of the northeast quarter, and the southeast quarter of section 18; lot 1, and the northeast quarter of the northwest quarter, and the north half of the northeast quarter of section 19.

Township 1 south, range 9 west, Uintah meridian, Utah; Southeast quarter of the northeast quarter, and the south half of section 13; south half of the south half of section 14; south half of the south half of section 15; the northwest quarter of the southwest quarter, and the south half of the south half of section 16; southwest quarter of the northeast quarter, and the south half of the northwest quarter, and the south half of section 17; section 18; lots 1, 3, and 4, and the northeast quarter of the northwest quarter, and the east half of the southwest quarter,

and the north half of the northeast quarter, and the southeast quarter of section 19; section 20; section 21; section 22; section 23; north half and the southwest quarter, and the northwest quarter of the southeast quarter of section 24; the northwest quarter of the northwest quarter of section 25; the north half of section 26; north half of section 27; the north half of section 28; the north half and the east half of the southwest quarter and the north half of the southeast quarter of section 29; lots 1, 2, and 3, and the east half of the northwest quarter, and the northeast quarter of section 30.

Township 1 south, range 10 west, Uintah meridian, Utah: The south half of the south half of section 10; the south half of the south half of section 11; the south half of the south half of section 12; section 13; section 14; section 15; section 16; the northeast quarter and south half of the northwest quarter, and the south half of section 17; the southeast quarter of the northeast quarter, and the southeast quarter of the southwest quarter, and the southeast quarter of section 18; section 19; section 20; section 21; section 22; section 23; section 24; the north half and the north half of the south half of section 25; section 26; section 27; section 28; section 29; the east half and lots 1, 2, 3, and 4, and the east half of the west half of section 30; lots 1, 2, 3, and 4, and the east half of the west half and the east half of section 31; section 32; the north half and the north half of the southwest quarter of section 33; the northeast quarter of the northeast quarter, and the west half of the northeast quarter, and the northwest quarter of section 34; the north half of the north half of section 35.

Township 1 south, range 11 west, Uintah meridian, Utah: Lots 1, 2, 3, and 4, and the east half of the west half, and the southeast quarter of section 18; section 19; the northwest quarter of the northwest quarter and the south half of the northwest quarter and the southwest quarter and the west half of the southeast quarter of



section 20; the east half and the the east half of the northwest quarter and the northeast quarter of the southwest quarer of section 25; the west half of the southwest quarter and the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section 28; section 29; section 30; the northeast quarter, and lots 1, 2, 3, and 4, and the east half of the west half, and the southeast quarter of section 31; section 32; section 33; section 34; the west half of section 35; the northeast quarter and the east half of the southeast quarter of section 36.

Township 1 south, range 12 west, Uintah meridian, Utah: Lots 1, 2, 3, and 4, and the south half of the south half of section 12; section 13; section 24; the northeast quarter, the northwest quarter, and the southeast quarter of section 25.

Township 2 south, range 10 west, Uintah meridian, Utah: Section 4, section 5; section 6; section 7; section 8; section 9.

Township 2 south, range 11 west, Uintah meridian, Utah: Lots 3 and 4 of section 2; lots 1, 2, 3, and 4, and the south half of the north half and the south half of section 3; lots 1, 2, 3, and 4, and the south half of the north half and the south half of section 4.

26. That area of the former Uintah Reservation reserved for reservoir and other purposes by Proclamations of August 3 and August 4, 1905 *supra*, and withdrawn for the Strawberry Valley reclamation project by orders of May 13, 1907, and November 12, 1909, as to which all right, title, and interest of the Indians was extinguished by the Act of April 4, 1910, *supra*, being the area for the taking of which just compensation is sought in No. 47570, constitutes 56,868.51 acres and is described as follows:

Uintah Special Meridian, Section 18, 19, 29, 30, 31 and 32, Township 2 South, Range 11 West;

Sections 1 to 36 inclusive, Township 3 South, Range 11 West;

Sections 1 to 12, inclusive, 15 to 22, inclusive, and Sections 27 to 32, inclusive, Township 4 South, Range 11 West;

Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 34, 35, 36, Township 2 South, Range 12 West;

Sections 1, 2, 12, Township 3, South, Range 12 West.

/s/ ERNEST L. WILKINSON
ERNEST L. WILKINSON
Attorney of Record for Plaintiffs

/s/ PENNY W. MORTON
Assistant Attorney General

/s/ FLOYD L. FRANCE
Attorney for the United States



**APPENDIX B**

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOREST SERVICE
324 25th Street
Ogden, Utah 84401

APR 8 1977

Honorable Scott M. Matheson
Governor of Utah
State Capitol
Salt Lake City, Utah 84114

Dear Governor Matheson:

We have reviewed the Ute Indian Tribe Resolution, 76-125, and Discussion Draft Agreement Between the State of Utah and the Ute Tribe on Civil and Criminal Jurisdiction dated March 25, 1977. There are certain sections in the Resolution and the draft Agreement which would affect the management of portions of the Ashley, Uinta, and Wasatch National Forests. We appreciate your consideration of our concerns relating to these sections.

The Indian Resolution essentially proposes, in items 10 and 11, to give certain property and jurisdictional rights vested in the State of Utah and the United States within the original exterior boundary of the Uintah and Ouray Reservation to the Ute Indian Tribe. It is proposed in item 11 that the Ute Indian Tribe be given hunting and fishing rights without regard to State laws and in item 10 full control of camping and recreation on 989,000 acres of National Forest land which they have related to the Central Utah Project.

The National Forest lands included within the original exterior boundary of the Uintah and Ouray Reservation provide a wide range of goods and services to the public.

Recreation use of this area, which includes 6 reservoirs and 31 lakes which will be stabilized, is and will be heavy. Much of the High Uintas Primitive Area is also encompassed within the boundary. Over 400,000 visitor days of use were recorded during 1975. Some of the recreation areas within this boundary now or to be constructed are the Strawberry, Current Creek, Whiterocks, and Upper Stillwater Reservoirs.

Under Definitions, item (d), non-trust lands; item (e), original exterior boundaries, and the comments under item 3, *Present Conflict*, we believe that the original Reservation boundaries were disestablished and the present Reservation boundaries include only the trust lands. The Act of March 3, 1905 (33 Stat. 873, 1070), authorized the establishment of the Uinta National Forest, which was accomplished by Presidential proclamation on July 14, 1905. The Presidential proclamation removed the lands from the Uintah and Ouray Reservation and placed them within the Uinta Forest Reserve to be subject to laws, rules, and regulations governing Forest Reserves. On February 13, 1931, Congress appropriated the sum of $1,217,221.25 to be paid to the Ute Indian Tribe for full satisfaction for lands taken in 1905, except for 36,223 acres which had been classified as coal lands. Public Law 84-717 under the Act of July 14, 1956, provided for settlement of the claims on the remaining 36,223 acres. Pursuant to formal stipulation of the parties, a consolidated judgment was entered by the Court of Claims for this case, No. 47569, and four vested cases Nos. 87568, 47510, 47511, and 47572, in favor of the plaintiffs and against the defendants in the amount of $3,250,000 in full settlement of all claims arising out of the five cases. Through these actions jurisdiction and tribal claims to the lands within the National Forest were disposed of and all rights, title, and interests to the lands were acquired by the United States. Since all of the Indian rights to these lands were acquired by the United States, there is no basis for considering them as part of



the Reservation. The boundaries of the Reservation would be in common with the exterior National Forest boundaries established by the 1905 proclamation and would not extend to the boundaries as established by Executive Order of October 3, 1861.

Item 3, *Present Conflict*, would provide the Tribe certain jurisdictional protections on non-trust lands where vital Indian interests are at stake. We believe the Agreement is referring to the hunting and fishing rights of tribal members as indicated under items 4 and 5. Item 4 states that the Ute Indian Tribe, "shall have the right to hunt, fish, boat, and trap within the original exterior boundaries of the Uintah and Ouray Reservation" and, "In addition, the Tribe agrees to regulate hunting, fishing, and trapping practices of the members of the Tribe so as to insure the maintenance of a proper biological balance between populations and available habitat. . . ." It further provides, "that all leases of such public lands entered into after the date of this Agreement shall recognize the hunting and fishing rights of tribal members free from any such consent or permission by the lessee."

The only reference we have been able to find concerning rights of the Indians to hunt and fish is in the unratified treaty of June 8, 1865, and October 30, 1865, which included the Utah Yampah Ute, Pah-vant, Sanpete Ute, Trim-p-nogs, and Cum-nm-bah Bands of the Utah Indians. Article 1 of this treaty indicates that the Indians would surrender and relinquish to the United States all their possessory rights of occupancy in the lands claimed and occupied by them within the areas of the thirty-eight and forty-first parallel in Utah. This area includes the width of the State and extends southward from approximately the south boundary of Wyoming to the thirty-eight parallel, which is approximately twenty miles north of Cedar City. Article IV of this unratified treaty states, "The right of taking fish at usual and accustomed grounds and stations is further reserved to said Indians in com-

mon with all white citizens of the Territory and of erecting temporary houses for the purpose of curing them, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands."

This unratified treaty would indicate that the fishing and hunting rights of the Ute Tribe could include approximately 75 percent of the State of Utah. If the State recognizes the Tribe's rights to hunt and fish within the 1861 reservation boundaries on the 989,000 acres on which all rights were acquired from the Indian Tribe, then it is possible the Tribe could assert an even stronger claim to hunting and fishing rights to the lands described in the 1865 unratified treaty.

Item 4 provides that all leases of public land entered into after the date of the Agreement shall recognize the hunting and fishing rights of tribal members free from any consent or permission by the lessee. Item 6 provides, "The parties recognize their mutual interest in protecting environmental values from damage that might result from uncontrolled growth of public recreational facilities within the original exterior boundaries of the Reservation. The parties therefore agree that the United States shall consult with the State and the Tribe on all plans, construction, developments, and operations of facilities within the original exterior boundaries of the Reservation pertaining to camping, obating, fishing, and other forms of public recreation." These items should either be deleted from the Agreement or modified to pertain only to tribal lands. The United States through the Secretary of Agriculture and the Forest Service is responsible for the administration of the National Forest lands, which includes the development of recreation facilities. These rights cannot be subordinated or diminished through agreement between the State and the Ute Indian Tribe. The only way these rights can be transferred to the Indian Tribe is by an Act of Congress or adjudication in a Federal Court.



We appreicate the opportunity to provide this information. We want to fully participate in any further deliberations on these issues.

Sincerely,

/s/ VERN HAMRE
VERN HAMRE
Regional Forester

## APPENDIX C

### LEGISLATIVE AND ADMINISTRATIVE DOCUMENTS CONFIRMING DISESTABLISHMENT OF ORIGINAL UINTAH RESERVATION

| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| LD 116 | Jan. 15, 1906 | 40 Cong. Rec. 1064 | ". . . lands which were heretofore a part of the Uintah Indian Reservation. . ." |
| LD 116 | Jan. 10, 1906 | 40 Cong. Rec. 1332 | ". . . lands which were heretofore a part of the Uintah Indian Reservation. . ." |
| LD 117 | Jan. 12, 1906 | Senate Report 139, 59th Cong., 1st Sess. | ". . . lands which were heretofore a part of the Uintah Indian Reservation. . ." |
| LD 119 | Jan. 18, 1906 | House Report 291, 59th Cong., 1st Sess. | ". . . lands which were heretofore a part of the Uintah Indian Reservation. . ." |
| LD 120 | Jan. 27, 1906 | 34 Stat. 9 | ". . . lands which were heretofore a part of the Uintah Indian Reservation. . ." |
| LD 122 | Feb. 9, 1906 | House Report 823, 59th Cong., 1st Sess. | ". . . Indians on the former Uintah Reservation. . ." |



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| JX 331 | Apr. 11, 1906 | Opinion of the Asst. Atty. General, 34 I.D. 549 | ". . . the lands formerly within the Uintah Indian Reservation. . ." (at 549-550) |
| LD 124 | Apr. 13, 1906 | Senate Report 2561, 59th Cong., 1st Sess. at 131 | ". . . the former Uintah Reservation. . ." |
| LD 126 | June 8, 1906 | Letter from Acting Commr. of Indian Affairs, found in Sen. Rep. 4263, 59th Cong., 1st Sess. at 2-3 | ". . . the former Uintah Reservation. . ." (at 2, first paragraph) |
| LD 126 | June 11, 1906 | Letter from Sec. of Interior, found in Sen. Rep. 4263, 59th Cong., 1st Sess. at 1 | ". . . the former Uintah Reservation. . ." (at 1, first paragraph) |
| LD 127 | June 21, 1906 | 34 Stat. 325, 375-376 | ". . . the former Uintah Reservation. . ." |
| LD 128 | June 25, 1906 | House Rep. 5010, 59th Cong., 1st Sess. | ". . . the former Uintah Reservation. . ." |
| LD 129 | June 29, 1906 | 34 Stat. 611 | ". . . the former Uintah Indian Reservation. . ." |
| LD 130 | June 12, 1906 | 40 Cong. Rec. 8306 | ". . . the former Uintah Indian Reservation. . ." |
| LD 130 | June 27, 1906 | 40 Cong. Rec. 9386 | ". . . the former Uintah Indian Reservation. . ." |

| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| LD 131 | 1906 | 40 Cong. Rec. Index<br>Senate Bill 321 | ". . . lands which were heretofore a part of the Uintah Indian Reservation. . ." |
| LD 131 | Apr. 24, 1906 | 40 Cong. Rec. 3553 | ". . . for Indians in the late Uintah Indian Reservation. . ." |
| LD 132 | Sept. 1, 1906 | Proclamation<br>34 Stat. 3228 | ". . . the former Uintah Reservation. . . (at 3228, last paragraph)<br>". . . are hereby restored to the public domain." (at 3229, first full paragraph |
| JX 336 | Sept. 26, 1907 | Letter from and to the Acting Commr. of Indian Affairs, respectively | ". . . the former Uintah Reservation, Utah. . ." (at 1, first paragraph; at 3, first paragraph) |
| JX 338 | Nov. 8, 1907 | Letter from First Asst. Secty. of the Interior | ". . . the former Uintah Reservation in Utah. . ." (at 1) |
| JX 339 | Nov. 11, 1907 | Letter from Chief Clerk of the Office of Indian Affairs | ". . . the former Uintah Reservation in Utah. . ." (at 1) |
| LD 135 | Apr. 30, 1908 | 35 Stat. 70, 95 | ". . . lands of any Indian of the former Uintah and Uncompahgre Reservations. . ." |

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| LD 136 | Dec. 16, 1908 | Letter from Commr. of Ind. Affairs, loctaed in House Doc. 1279, 60th Cong. 2d Sess. at 2-3 | ". . . the former Uintah Reservation (at 2, second full paragraph; 3, last paragraph in letter |
| LD 136 | Dec. 19, 1908 | Letter from Secty. of the Interior, located in House Doc. 1279, 60th Cong. 2d Sess. at 1-2 | ". . . the former Uintah Reservation" (at 2, seventh line) |
| JX 341 | Dec. 19, 1908 | Letter from the Secty. of the Interior to the Secty. of Treasury | ". . . the former Uintah Reservation." (at 1, first paragraph; 2, first paragraph; 3 last paragraph; 6, last line) |
| LD 137 | Feb. 24, 1909 | 35 Stat. 644 | ". . . the former Ute Indian Reservation. . ." |
| LD 138 | Feb. 14, 1910 | Sen. Rep. No. 219, 61st Cong., 2d Sess. | ". . . the former Uintah Reservation. . ." (Note: the words "former Uintah Indian Reservation also appear in the title of the report.) |
| LD 139 | Apr. 4, 1910 | 36 Stat. 269, 285 | ". . . the former Uintah Indian Reservation. . ."<br>". . . the ceded Uintah Indian Reservation. . ." |

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| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| JX 343 | July 9, 1910 | Letter from the Acting Secty. of the Interior, 39 I.D. 79 | ". . . the former Uintah Indian Reservation. . ." (at 79, first paragraph) |
| JX 345 | Feb. 3, 1911 | Letter from Commr. of Indian Affairs | ". . . the former Uintah Indian Reservation. . ." (at 1, first paragraph) |
| LD 141 | Mar. 31, 1911 | 36 Stat. 1058, 1074 | ". . . the former Uintah Indian Reservation. . ."<br>"the ceded Uintah Indian Reservation. . ." |
| JX 346 | May 1, 1911 | Letter from Supt. of Irrigation | ". . . the former Uintah Reservation, Utah. . ." (at 1, block quote) |
| JX 347 | May 16, 1911 | Letter from Acting Commr. of Indian Affairs | ". . . the former Uintah Indian Reservation. . ." (at 1) |
| JX 348 | May 19, 1911 | Letter from first Asst. Secty. of the Interior | ". . . the former Uintah Indian Reservation. . ." (at 1, first paragraph) |
| JX 349 | June 3, 1911 | Letter from second Asst. Secty. of the Interior | ". . . the former Uintah Reservation. . ." (at 1, first paragraph) |



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| JX 351 | June 27, 1911 | Letter from Asst. Commr. of Indian Affairs | ". . . the former Uintah Reservation. . ." (at 1, first paragraph) |
| JX 352 | July 12, 1911 | Letter from First Asst. Secty. of the Interior | ". . . the former Uintah Indian Reservation. . ." (at 1, first paragraph) |
| LD 146 | Sept. 23, 1911 | Letter from Chief Supervisor, contained in H.R. Doc. 892, 62d Cong. 2d Sess. (July 27, 1912) at 8 | ". . . the former Uintah Indian Reservation. . ." (at 8, first paragraph of letter to Means) |
| LD 146 | Sept. 30, 1911 | Joint Rept. by Special Inspectors to the Secty. of the Interior, contained in H.R. Doc. 892, 62d Cong. 2d Sess. (July 27, 1912) at 1-2 | ". . . the former Uintah Indian Reservation. . ." (at 1, first paragraph)<br>". . . and there were restored to the public domain . . . 1,004,005 acres. . ." (at 2, fourth paragraph) |
| JX 356 | June 1, 1912 | Letter from Supt. of Uintah & Ouray Agency | ". . . formerly a part of the Uintah and White River Indian Reservation. . ." (at 1) |
| LD 142 | June 15, 1912 | Sen. Rep. No. 893, 62d Cong. 2d Sess. | ". . . the former Uintah Indian Reservation. . ." |
| JX 357 | July 2, 1912 | Letter from Second Asst. Commr. of Indian Affairs | ". . . formerly a part of the Uintah and White River Indian lands. . ." (at 1, first paragraph) |

| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| LD 143 | July 8, 1912 | H. Rep. No. 943, 62d Cong. 2d Sess. | ". . . the former Uintah Indian Reservation. . ." |
| LD 144 | July 15, 1912 | 48 Cong. Rec. 9012 | ". . . the late Uintah Reservation. . ." |
| LD 145 | July 20, 1912 | 37 Stat. 196 | ". . . land which was formerly a part of the Uintah Indian Reservation. . ." (first paragraph |
| JX 358 | Aug. 8, 1912 | Letter from Commr. of General Land Office | ". . . land which was formerly a part of the Uintah Reservation. . ." (at 148) |
| JX 359 | October 1912 | Dept. of the Interior Memorandum | ". . . restored to the public domain. . ." (at 1, line 3)<br>". . . the former Uintah Reservation." (at 1, line 13)<br>". . . the former reservation lands. . ." (at 2, line 11)<br>". . . this is no longer an Indian Reservation. . ." (at 3-4) |
| JX 361 | June 7, 1913 | Letter from Second Asst. Commr. of Indian Affairs | ". . . the former Uintah Indian Reservation. . ." (at 1, first paragraph) |



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| JX 363 | May 12, 1914 | Letter from Commr. of Indian Affairs | ". . . the former Uintah reservation. . ." (at 1, first paragraph) |
| LD 149 | Dec. 7, 1914 | Letter from Secty. of the Interior, located in H. Doc. 1250, at 2-3 | ". . . and there were restored to the public domain . . . about 1,004,285 acres. . ." (at 2, sixth paragraph)<br>". . . the former Uintah Indian Reservation. . ." (at 2, last paragraph; 3, block quote-last line) |
| JX 366 | Feb. 9, 1915 | Letter from Commr. of Indian Affairs | ". . . the former Uintah Indian reservation. . ." (at 1, first paragraph) |
| JX 367 | May 29, 1915 | Letter from Asst. Commr. of Indian Affairs | ". . . the former Uintah reservation. . ." (at 1, first paragraph) |
| JX 376 | Apr. 15, 1916 | Letter from Secty. of the Interior | ". . . lands within their former treaty reservation. . ." (at 9, second full paragraph) |
| JX 377 | Apr. 26, 1916 | Letter from Asst. Attorney General | ". . . the former Uintah Reservation. . ." (at 1, first paragraph) |
| JX 378 | May 3, 1916 | Letter from Acting Asst. commr. of Indian Affairs | ". . . the former Uintah Reservation. . ." (at 1) |

| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| JX 379 | Aug. 10, 1916 | Bill of Complaint in case brought by Secty. of the Interior | ". . . as Trustee of the Indians of the former Uintah and Ouray Indian Reservation," (at 1, caption; 2, first line) |
| JX 382 | Jan. 24, 1917 | Letter from Asst. Secty. of the Interior | ". . . the former Uintah Indian Reservation. . ." (at 1, first paragraph) |
| JX 383 | Feb. 23, 1917 | Letter from Asst. Secty. of the Interior | ". . . the former Uintah and Ouray Reservation. . ." (at 1, first paragraph) |
| JX 385 | May 19, 1917 | Letter from Commr. of Indian Affairs | ". . . Indian lands formerly within the Uintah Reservation. . ." (at 1, first paragraph) |
| JX 388 | Feb. 28, 1918 | Letter from Sen. Smoot | ". . . the former Uintah Indian Reservation. . ." (at first paragraph) |
| JX 389 | Mar. 9, 1918 | Letter from Commr. of Indian Affairs | ". . . the former Uintah Indian Reservation. . ." (at 1, first paragraph) |



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| JX 390 | Apr. 13, 1918 | Letter from Asst. Secty. of the Interior | ". . . the former Uintah Reservation. . ." (at 1, first paragraph) |
| JX 391 | June 11, 1918 | Letter from Sen. Smoot | ". . . the former Uintah Reservation. . ." |
| JX 392 | Dec. 3, 1918 | Letter from Asst. Attorney General | ". . . the former Uintah Reservation. . ." (at 1, first paragraph) |
| LD 154 | Apr. 23, 1920 | H. Rep. 901, 66th Cong. 2d Sess, at 1 | ". . . to the unsold lands formerly included in the Uintah Indian Reservation. . ." |
| JX 401 | Mar. 20, 1922 | memorandum from Chief Supervisor of Forests | ". . . the former Uintah Indian Reservation. . ." (at 1, second paragraph) |
| LD 155 | May 14, 1920 | 41 Stat. 599-600 | ". . . lands in the former Uintah Indian Reservation. . ." |
| LD 179 | Sept. 7, 1922 | Letter from Secty. of the Interior, located in H. Rep. No. 370, 77th Cong. 1st Sess. (April 3, 1941) at 9, 12 | ". . . former Uintah Indian Reservation. . . (at 9, first and last paragraphs; at 12, first and last paragraphs) |
| JX 403 | Sept. 28, 1922 | Letter from Commr. of General Land Office | "ceded Uintah lands" (at 1, first paragraph)<br>"The lands within said former |

| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| | | | reservation. . ." (at 1, second paragraph) |
| LD 159 | Feb. 17, 1923 | H. Rep. 1633, 67th Cong. 4th Sess. at 1 | ". . . lands in the former Uintah Indian Reservation. . ." (at 1) "These lands were formerly embraced in the Uinta Indian Reservation. . ." (at 2, fourth paragraph) |
| LD 162 | Feb. 11, 1927 | H. Rep. No. 2047, 69th Cong. 2d Sess. at 3 | ". . . ceded lands" |
| JX 413 | July 27, 1927 | Letter from Act. Commr. of General Land Office | ". . . former Uintah Indian Reservation. . ." (at 1, second paragraph) |
| JX 419 | Apr. 13, 1929 | Letter from Commr. of Indian Affairs | ". . . the former Uintah Indian Reservation. . ." (at first paragraph) |
| JX 423 | Sept. 22, 1931 | Letter from Director of forestry | "ceded" lands (at 2, line 7) ". . . the former Uintah Reservation. . ." (at 2, first full paragraph) "ceded" lands (at 2, second full paragraph) |

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| JX 424 | Nov. 21, 1931 | Letter from the Forester | "The balance of the area originally forming the large Uintah-Ouray Reservation of 3,972,490 acres is made up of Indian allotments, homesteads, and ceded lands. . ." (at 3, last paragraph) |
| JX 430 | Oct. 14, 1933 | Letter from Commr. of Indian Affairs | ". . . the former Uintah Reservation." |
| JX 441 | Apr. 18, 1938 | Letter from Director of Lands | ". . . the former Uintah and Ouray Indian Reservation." (at first paragraph) "ceded" lands (at first paragraph) |
| JX 443 | November 1938 | Report of Regional Forester-Grazing Resources on Uintah and Ouray Reservation | ". . . the former Uintah and Ouray Reservation." (at 1, first paragraph; 5, #5; 6, last line) ". . . ceded lands. . ." (at 8, sixth and last paragraphs; 9, second, third, fifth and last paragraphs; 8-a, first paragraph; 10, fourth and fifth paragraphs; 11, first and fourth paragraphs) |
| JX 444 | Jan. 24, 1939 | Letter from Supt. of Uintah & Ouray Agency | "ceded" lands (at third paragraph) |

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| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| JX 450 | June 19, 1941 | Letter from Commr. of Indian Affairs | ". . . the former boundaries of the Uintah and Ouray Indian Reservation. . ." (at 1, first paragraph) |
| JX 454 | Jan. 27, 1947 | Opinion of Interior Solicitor, 59 I.D. 393 | "Allotments were made to Indians entitled to allotments within the area, and the balance of the lands . . . were restored to the public domain. . ." (at 393, second paragraph) |
| JX 455 | Undated | Stipulations, *The Uintah and White River Bands of the Ute Indians v. United States* | ". . . allotments in severalty . . . were made to the Uintah and White River Indians, and surplus lands . . . were restored to the public domain. . ." (at 10, last paragraph)<br>". . . the former Uintah Reservation. . ." (at 11, eighth line; 14, paragraph 22; 17, paragraph 25, 23, paragraph 26)<br>". . . the former Uintah Indian Reservation. . ." (at 15, first line; 15, paragraph 23; 17, third full paragraph) |

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| LD 200 | Mar. 26, 1956 | Letter from Asst. Secty. of the Interior, located in H. Rep. No. 2171, 84th Cong., 2d Sess. (May 16, 1956), at 4-6 | ". . . lands formerly a part of the Uintah Indian Reservation." (at 4, first paragraph of letter) |
| LD 200 | Mar. 23, 1956 | Letter from Asst. Attorney General, Lands Division, located in H. Rep. No. 2171, 84th Cong. 2d Sess. (May 16, 1956), at 6-8 | ". . . lands formerly a part of the Unintah Indian Reservation." (at 6, first paragraph of letter) |
| LD 200 | Mar. 26, 1956 | Letter from Acting Secty. of Agriculture, located in H. Rep. No. 2171, 84th Cong. 2d Sess. (May 16, 1956), at 8-10 | ". . . lands formerly a part of the Unintah Indian Reservation." (at 8, first paragraph of letter) |
| LD 201 | Apr. 16, 1956 | Letter from Asst. Secty. of the Interior, located in S. Rep. No. 2372, 84th Cong. 2d Sess. (June 27, 1956) at 3-5 | ". . . lands formerly a part of the Unintah Indian Reservation." (at 3, first paragraph of letter |
| LD 201 | Mar. 26, 1956 | Letter from Asst. Attorney General, Lands Division, located in S. Rep. No. 2372, 84th Cong. 2d Sess. (June 27, 1956) at 5-7 | ". . . lands formerly a part of the Unintah Indian Reservation." (at 5, first paragraph of letter) |
| LD 201 | Mar. 26, 1956 | Letter from Acting Secty. of Agriculture, located in S. Rep. No. 2372, 84th Cong. 2d Sess. (June 27, 1956) at 7-9 | ". . . lands formerly a part of the Unintah Indian Reservation." (at 7, first paragraph of letter) |

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| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| LD 201 | Mar. 26, 1956 | Letter from Director of Bureau of the Budget, located in S. Rep. No. 2372, 84th Cong. 2d Sess. (June 27, 1956) at 9 | ". . . lands formerly a part of the Unintah Indian Reservation." (at 9, fisrt paragraph of letter) |
| LD 203 | July 14, 1956 | P.L. 717, 70 Stat. 546, 548 | ". . . the former Uintah Reservation. . ." (Sect. 6, second line) |
| JX 469 | Nov. 18, 1964 | Memo from Solicitor | "In 1902, Congress provided for an allotment and restoration of the balance of unallotted land . . . to the public domain. . ." (at 2, third paragraph) |
| JX 482 | Undated | Memorandum from Commr. of Indian Affairs | ". . . the bulk of the unallotted lands of the Uintah and Ouray Reservation in Utah were to be restored to the public domain. . ." (at 1, first paragraph) |
| LD 210 | Oct. 1, 1971 | Secretarial Order, 36 Fed. Register, No. 198, p. 19920 | ". . . most of the unallotted lands of the Uintah and Ouray Reservation in Utah were restored to the public domain. . ." (at 10020, second column, first full paragraph) |





## APPENDIX D

IN THE UTAH COURT OF APPEALS

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Case No. 910532-CA

ROOSEVELT CITY,
*Plaintiff and Appellee,*

v.

ROGER ROMAN GARDNER,
*Defendant and Appellant.*

---

Eighth Circuit, Roosevelt Department
The Honorable A. Lynn Payne

Attorneys: Joel D. Berrett, Roosevelt, for Appellant
Craig Bunnell, Roosevelt, for Appellee

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OPINION

(Filed November 9, 1992)

Before Judges Billings, Greenwood, and Orme.

BILLINGS, Associate Presiding Judge:

Defendant Roger Roman Gardner pleaded guilty in Eighth Circuit Court to criminal mischief, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-106 (Supp. 1992), and unlawful possession and consumption of alcohol, a class B misdemeanor, in violation of Utah Code Ann. § 32A-12-209 (Supp. 1992), following the trial court's denial of defendant's motion to dismiss on juris-

dictional grounds. Defendant appeals, claiming the trial court lacked jurisdiction because he is an Indian and because Roosevelt, Utah, where the crimes took place, is in Indian country. We affirm.

Federal law provides for exclusive federal jurisdiction over Indians who commit crimes in Indian country, with some exceptions. *See* 18 U.S.C. §§ 1152-1153 (1988); *State v. Perank*, 191 Utah Adv. Rep. 5, 5 (Utah 1992). Defendant's jurisdictional challenge thus presents two issues: (1) whether defendant is an Indian,[1] and (2) whether Roosevelt, Utah is in Indian country.

The Utah Supreme Court recently held that a 1902 congressional act, as amended by 1903, 1904 and 1905 acts, restored the unallotted, unreserved lands of the Uintah-Ouray Indian Reservation to the public domain, diminishing the reservation boundaries. *See Perank*, 191 Utah Adv. Rep. at 18. In so doing, the supreme court disagreed with the decision of the United States Court of Appeals for the Tenth Circuit in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994, 107 S. Ct. 596 (1986). *See Perank*, 191 Utah Adv. Rep. at 22 (Zimmerman, J., dissenting).

The supreme court's decision in *Perank* held that Myton, Utah lies outside the boundaries of the reservation and is not within Indian country. *See id.* at 18. In *State v. Coando*, 191 Utah Adv. Rep. 25 (Utah 1992), decided the same day as *Perank*, the supreme court stated that, under the reasoning of *Perank*, Roosevelt, Utah also lies outside Indian country. *See Coando*, 191 Utah Adv. Rep. at 26.

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[1] We do not address whether defendant is an Indian for purposes of federal jurisdiction because we conclude defendant did not commit the crimes in Indian country.

[2] We note that the issue we decide today is currently the subject of injunctive proceedings in the United States District Court for the District of Utah and a petition for certiorari in the United States Supreme Court. *See* Minute Entry in *State v. Perank*, No. 860243 (Utah August 4, 1992).



Thus, because defendant committed the crimes in Roosevelt, Utah, which is not in Indian country under controlling Utah law, the circuit court had subject matter jurisdiction. We, therefore, affirm defendant's convictions.

/s/ Judith M. Billings
JUDITH M. BILLINGS
Associate Presiding Judge

WE CONCUR:

/s/ Pamela T. Greenwood
PAMELA T. GREENWOOD
Judge

/s/ Gregory K. Orme
GREGORY K. ORME
Judge

Supreme Court, U.S.
FILED
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No. 92-6281

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT P. HAGEN,

*Petitioner,*

v.

STATE OF UTAH,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of the State of Utah**

## BRIEF FOR THE STATES OF CALIFORNIA, NORTH DAKOTA, SOUTH DAKOTA, AND WASHINGTON, AS AMICI CURIAE IN SUPPORT OF RESPONDENT STATE OF UTAH

DANIEL E. LUNGREN
Attorney General
State of California
Office of Attorney General
1515 K Street
Sacramento, CA 95814
(916) 445-9555

NICHOLAS SPAETH
Attorney General
State of North Dakota
CHARLES CARVELL
Assistant Attorney General
Office of Attorney General
600 East Boulevard
Bismarck, ND 58505
(701) 224-2210

MARK BARNETT
Attorney General
State of South Dakota
LAWRENCE E. LONG
*Counsel of Record*
Chief Deputy Attorney General
Office of Attorney General
500 East Capitol
Pierre, SD 57501
(605) 773-3215

KEN EIKENBERRY
Attorney General
State of Washington
Office of Attorney General
Highways-Licenses Building
PB-71
Olympia, WA 98504
(206) 753-6200

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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No. 92-6281

---

ROBERT P. HAGEN,

*Petitioner,*

v.

STATE OF UTAH,

*Respondent.*

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**On Petition for Writ of Certiorari to the Supreme Court of the State of Utah**

---

## BRIEF FOR THE STATES OF CALIFORNIA, NORTH DAKOTA, SOUTH DAKOTA, AND WASHINGTON, AS AMICI CURIAE IN SUPPORT OF RESPONDENT STATE OF UTAH

---

### INTEREST OF AMICI CURIAE

This case presents an issue of substantial importance to *Amici* and other States with present and former Indian reservations. In 1985, the United States Court of Appeals for the Tenth Circuit concluded that Acts of Congress with operative language restoring Indian reservations to the public domain were not intended to disestablish those reservations. *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986). The Court of Appeals premised its decision on a misreading of *Solem v. Bartlett*, 465 U.S. 463 (1984), and plaintiffs in New Mexico and elsewhere specifically relied on this misreading in an attempt to resurrect boundaries of Indian reservations long

deemed disestablished. The Utah Supreme Court has now disagreed with the Tenth Circuit Court's decision in *Ute Indian Tribe* and ruled that a restoration to the public domain Act diminished the same reservation in Utah. *Utah v. Perank*, —— P.2d ——, 191 Utah Adv. Rep. 5 (Utah 1992), *Utah v. Hagen*, —— P.2d ——, 191 Utah Adv. Rep. 26 (Utah 1992), set forth in Resp. App. at 4a-75a. This Court should resolve the conflicting decisions between the state and federal courts on this issue.

*Amici* States have an obvious sovereign interest in knowing, with some degree of certainty, where the boundaries of Indian reservations are located. The present petition presents a valuable opportunity to continue the process, begun by the Court's modern decisions in *Seymour v. Superintendent*, 368 U.S. 351 (1962), of defining the manner in which surplus land statutes of this kind affected Indian reservations throughout the United States.[1]

## SUMMARY OF ARGUMENT

The Utah Supreme Court decided the issue within the guidelines of this Court's precedents, but the *en banc* majority of the court of appeals did not. The *en banc* majority's rationale, premised on a misconstruction of the significance of "public domain" language, is of substantial concern to *Amici*. Heretofore, the equation of public domain language with reservation disestablishment has been a universally accepted principle of federal Indian law. Throughout the Western States, Congress and the Executive Branch routinely utilized such terminology in the language and legislative history of Acts such as presented here. While *Amici* unequivocally support and share the concern of Respondent State of Utah that the second largest Indian reservation in the

[1] The majority of other States ordinarily interested in federal Indian law issues were not notified or requested to join in this brief because of time restrictions.



United States (4,000,000 acres) has been resurrected in Utah as a result of this misconstruction, the sweeping mischaracterization of *Solem* by the *en banc* majority undermines an area of federal Indian law that is of even broader consequence.

## ARGUMENT

1. The relationship of public domain terminology to Indian reservations is of paramount significance in federal Indian law. In South Dakota, for example, millions of acres of Indian reservations were "restored to the public domain". *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589 (1977). *See, generally, Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). The Utah Supreme Court was clearly correct when it noted:

> we have encountered only one case that stands contrary to these Supreme Court decisions on the effect of restoration language. *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (*en banc*), *cert. denied*, 479 U.S. 994 (1986) . . .

*Perank*, Resp. App. at 23a.

The Utah Supreme Court also identified the source of the problem. In essence, the *en banc* majority in *Ute Indian Tribe* mistakenly believed that this Court's 1984 decision in *Solem v. Bartlett*, *supra*, changed the law in reservation boundary cases. *Perank*, Resp. App. at 24a-28a.

Until the *en banc* majority's decision, no court seriously questioned that operative language was not precisely suited to disestablishment. *Seymour v. Superintendent*, 368 U.S. 351, 354-55 (1962); *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973). See, generally, *United States v. Pelican*, 232 U.S. 442 (1914).

Indeed, in 1975, when this Court framed the issue in *DeCoteau v. District County Court*, 420 U.S. 425 (1975),

it did so in terms of an underlying inquiry for "public domain" indicia:

> These two cases, consolidated for decision, raise the single question whether the Lake Traverse Indian Reservation in South Dakota, created by an 1867 treaty between the United States and the Sisseton and Wahpeton bands of Sioux Indians, was terminated *and returned to the public domain, by the Act of March 3, 1891.*

*DeCoteau, supra* at 426-427 (emphasis added).

Since the legislative history in *DeCoteau* indicated that Congress intended to restore the reservation to the public domain, the issue was decisively resolved. *See DeCoteau*, 420 U.S. at 441, where, after noting that the intended effect of the Act was made clear by the sponsors, this Court set forth in the text of the opinion two "public domain" excerpts from the Congressional Record ("surrender of a large portion of their reservation to the public domain"; "all this land is opened by this bill to settlement as a part of the public domain"), *Id.* at 439-441. In concluding, the Court reiterated this basic understanding:

> That the lands ceded in the other agreements were *returned to the public domain*, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation stated repeatedly that the ratified agreements would *return the ceded lands to the 'public domain.'* See *supra*, at 440-441. Cf. *Mattz v. Arnett*, 412 U.S. 481, at 504 n.22.

*DeCoteau*, 420 U.S. at 446. (emphasis added.)

Two years later, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), this aspect of the issue was treated essentially the same. *Rosebud*, 430 U.S. at 589, 600, 600 n.21. Even the *Rosebud* dissent expressly acknowledged that "restored to the public domain" was "clear language of express termination", as the Utah Supreme Court noted. Resp. App. 21a-22a. *Rosebud*, 430 U.S. at 618 (Marshall, J., dissenting).



Moreover, with respect to operative public domain language, the decision of the *en banc* majority unequivocally "conflicts in principle" with not just one circuit but all circuits—in fact, it appears to "conflict in principle" with all reported decisions that have addressed indirectly or directly, the effect of a Congressional act or Executive order whose operative language restored an Indian reservation to the public domain. Brief of Respondent State of Utah 16-24. This controlling aspect of the opinion, which influenced the *en banc* majority's view of other pertinent factors, clearly warrants review.

Compounding the *en banc* majority's mischaracterization of *Solem* and making even more certain the predictability of additional litigation in these areas is the evaluation in a Comment in the *American Indian Law Review* that was awarded first place in the Indian Law Writing Competition at Harvard University:[2] The author there concludes, as did the *en banc* majority, after *Solem* "[t]he category of statutory language terminating a reservation has been reduced by *eliminating* 'public domain' . . . the argument *approved* in *Solem v. Bartlett*, that the public domain language in surplus land acts carried little meaning. . . .", *id.* at 69-70, 73 (emphasis added). In context, the remarks in *Solem* were not intended to support such a conclusion.[3] Nevertheless, that such a conclu-

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[2] Comment, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment*, 12 A.I.L.Rev. 57 (1986).

[3] In contrast to the operative public domain language in the Utah Acts and Proclamations, the reference to public domain in *Solem* was an isolated one. Public domain terminology did not appear in the operative language of the *Solem* Act, and although the reference itself was deemed supportive of disestablishment, *Solem* noted that it was "hardly dispositive" when "balanced against" other persuasive evidence of continuing reservation status. *Solem*, 465 U.S. at 475.

sion could be erroneously attributed to *Solem* shows how unsettling and disruptive the *en banc* majority's decision promises to be.

2. Significantly, the Utah Supreme Court also noted:

> After the decision in *Ute Indian Tribe* was rendered, a panel of the Tenth Circuit in *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1397-1404 (10th Cir.), *cert. denied*, 111 S. Ct. 581 (1990), revisited the issue of the legal meaning of the phrase "restore to the public domain" and held that when used as operative statutory language, the phrase extinguishes reservation boundaries as to that land restored to the public domain. We set out an extended portion of the court's analysis of the legal effect of restoration language, an analysis *not* undertaken in *Ute Indian Tribe*.

Resp. App. 24a (emphasis added).

And, as Respondent State of Utah explains, this is an important and favorable development. Brief for Respondent State of Utah at 21-22. In addition, two other aspects of *Yazzie* merit brief attention.

First, even after *Yazzie*, the Tenth Circuit is still squarely divided on the public domain question. A petition for rehearing was denied on an even vote. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, No. 88-2413, Order Denying Rehearing *en banc* (10th Cir. July 23, 1990). In this light, the need for additional guidance from this Court is apparent.

Secondly, there is no question that others would benefit from this guidance as well, as *Yazzie* also attests.

> In this context, we note that in the companion case of *Blatchford v. Sullivan*, 904 F.2d 542 (10th Cir. 1990), another judge in the federal district of New Mexico ruled that the New Mexico 709/774 area had lost reservation status. In other words, two separate judges from the same federal district, using much of the same evidence, made directly contrary findings of fact and conclusions of law with respect to the same issue of reservation status (see Appendices B and C hereto). Those conflicting findings and rulings are simultaneously before us in our joint consideration of these cases.



*Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1394, n.7 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 581 (1990) (emphasis added).

Moreover, the confusion noted above is not limited to the public domain dispute in the Tenth Circuit. Most recently, in the Eighth Circuit the United States District Court in North Dakota appropriately recounted "the continuation of, to the Court, the some what inexplicable double standard" in a quick review of cases there involving other "virtually identical" Acts and yet, "opposite" results. Memorandum and Order at 2-3, *U.S. v. Standish*, Criminal Case No. C4-92-22-02 (D.N.D. October 29, 1992). *See e.g., United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987).

3. During the late 1800's and early 1900's Congress [4] and the President [5] frequently used public domain lan-

---

[4] *See, e.g.*, 17 Stat. 633 (Round Valley); 23 Stat. 80 (Columbia); 25 Stat. 157, § 1 (Uintah); 25 Stat. 896, 21 (Great Sioux Nation); 27 Stat. 63 (Colville); 27 Stat. 467 (White Mountain Apache); 27 Stat. 642, (10 (Cherokee Outlet); 28 Stat. 678, 4 (Southern Utes); 35 Stat. 457, 25 (Navajo).

[5] *See, e.g.*, Exec. Order of July 2, 1872 (I Kappler 916) (Colville); Exec. Order of August 5, 1873 (I Kappler 813) (White Mountain Apache); Exec. Order of August 19, 1874 (I Kappler 856) (Blackfeet); Exec. Order of December 21, 1875 (I Kappler 874) (Hot Springs); Exec. Order of January 28, 1876 (I Kappler 889) (Malheur Res.); Exec. Order of October 30, 1876 (I Kappler 814 (White Mountain); Exec. Order of May 3, 1877 (I Kappler 821) (Mission Res.); Exec. Order of August 3, 1878 (I Kappler 831) (Tulee River); Exec. Order of August 9, 1879 (I Kappler 899) (Sioux); Exec. Orders of July 13, 1880 (I Kappler 856, 883 & 896) (Blackfeet, Fort Berthold and Yanktonais); Exec. Order of August 4, 1882

guage to open Indian reservations for entry and settlement. Until the decision of the *en banc* majority, such restoration-to-the-public-domain language meant that the reservation was disestablished, a point well understood by the Utah Supreme Court, by this Court, by Congress, by the President, by the Department of the Interior and by the Department of Justice.

Authoritative review by this Court at this time will limit the writs for *habeas corpus* and other related actions, in precisely the same manner as in *DeCoteau*, when this Court acted decisively and reversed the decision of the Court of Appeals for the Eighth Circuit for a similarly fundamental misconstruction. *DeCoteau*, 420 U.S. at 430, 447. In the absence of such review, an inordinate expenditure of time, effort and resources will continue to be wasted on an issue that had been settled for decades.

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(I Kappler 834-35) (Ute); Exec. Order of September 13, 1882 (I Kappler 889-90) (Malheur Res.); Exec. Order of February 5, 1883 (I Kappler 823) (Mission Res.); Exec. Order of February 23, 1883 (I Kappler 904-05) (Chief Moses); Exec. Order of May 21, 1883 (I Kappler 890) (Malheur Res.); Exec. Order of March 20, 1884 (I Kappler 884-85) (Great Sioux Nation); Exec. Order of March 29, 1884 (I Kappler 885) (Turtle Mountain); Exec. Order of May 15, 1884 (I Kappler 875) (Jicarilla Apache); Exec. Order of June 3, 1884 (I Kappler 885) (Turtle Mountain); Exec. Order of January 29, 1887 (I Kappler 824) (Mission Indians); Exec. Order of March 2, 1889 (I Kappler 890) (Malheur); Exec. Order of December 22, 1902 (III Kappler 671) (San Carlos); Exec. Order of January 25, 1904 (III Kappler 681) (Sioux); Exec. Order of May 15, 1905 (III Kappler 675) (Capitan Grande Band); Exec. Order of June 17, 1909 (III Kappler 668 (Papago Indians); Exec. Order of November 11, 1909 (III Kappler 691) (Chehalis Indians); and Exec. Order of March 1, 1910 (III Kappler 685) (Mescalero).



## CONCLUSION

For the foregoing reasons and the reasons stated in the Petition and the Brief of Respondent State of Utah, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
State of California
Office of Attorney General
1515 K Street
Sacramento, CA 95814
(916) 445-9555

NICHOLAS SPAETH
Attorney General
State of North Dakota
CHARLES CARVELL
Assistant Attorney General
Office of Attorney General
600 East Boulevard
Bismarck, ND 58505
(701) 224-2210

MARK BARNETT
Attorney General
State of South Dakota
LAWRENCE E. LONG
*Counsel of Record*
Chief Deputy Attorney General
Office of Attorney General
500 East Capitol
Pierre, SD 57501
(605) 773-3215

KEN EIKENBERRY
Attorney General
State of Washington
Office of Attorney General
Highways-Licenses Building
PB-71
Olympia, WA 98504
(206) 753-6200

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1992**

PRINTED COPY

ROBERT P. HAGEN,
PETITIONER,

vs.

STATE OF UTAH,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF UTAH

# BRIEF OF AMICUS CURIAE UTE INDIAN TRIBE

# IN OPPOSITION TO THE WRIT OF CERTIORARI

Robert S. Thompson, III, Counsel of Record
Sandra Hansen
Jeanne S. Whiteing
Tod J. Smith
WHITEING & THOMPSON
1136 Pearl Street, Suite 203
Boulder, Colorado 80302
(303) 444-2549
Counsel for Amicus Curiae
Ute Indian Tribe

Nov. 18, 1992

## QUESTION PRESENTED*

1. Whether the State of Utah is precluded, by virtue of its voluntary participation as a defendant in Ute Indian Tribe v. Utah, 521 F.Supp. 1072 (D. Utah 1981); aff'd in part, rev'd in part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986), from relitigating the issue of whether Congress intended to disestablish the Uintah Valley Reservation, Utah.

## LIST OF PARTIES

The petitioner in this action is Robert P. Hagen, an enrolled member of the Little Shell Band of Chippewa Indians, which is not an Indian tribe that has been recognized by the United States. The respondent is the State of Utah. The Ute Indian Tribe appears before this Court, for the first time in these proceedings, as amicus curiae.

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* The Ute Indian Tribe opposes the petition for writ of certiorari in this case and is filing this amicus brief pursuant to Sup. Ct. R. 37.1 in order to bring to the Court's attention relevant matters not disclosed by the petitioner or respondent. Because the petitioner filed in forma pauperis, the Tribe is also filing its brief in accordance with Sup. Ct. R. 39.5.

## INTEREST OF AMICUS UTE INDIAN TRIBE**

Through its governing body, the Ute Indian Tribe*** exercises civil and criminal jurisdiction within the confines of the Uintah and Ouray Reservation in northeastern Utah. After more than 10 years of litigation, in which all parties with an interest in the geographical scope of the Tribe's jurisdiction, including the State of Utah, were fully represented, the boundaries of the Reservation were confirmed by the United States Court of Appeals for the Tenth Circuit in 1985. See Ute Indian Tribe v. Utah, 521 F.Supp. 1072 (D. Utah 1981), aff'd in part, rev'd in part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). The decision of the Tenth Circuit confirmed that the Tribe's jurisdiction extends to some 4.4 million acres. The current controversy, in which the Tribe was not invited to, and, heretofore, did not, participate, threatens to

** Letters from counsel for the petitioner and respondent consenting to the Tribe's participation in this proceeding as amicus curiae are included in Appendix A, as required by Sup. Ct. Rule 37.2.

*** The Ute Indian Tribe is organized as a constitutional government under the provisions of the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 986.



diminish by more than three million acres the jurisdictional territory of the Tribe and the area in which its citizens (and, in certain circumstances, enrolled members of other federally recognized Indian tribes) are governed by tribal and federal, as opposed to state, law.

As a governmental entity with sovereign authority over its territory, there is no issue of greater importance to the Tribe than the extent of its territorial jurisdiction. The Tribe has a fundamental interest in protecting the integrity of its territorial jurisdiction, especially where the geographic scope of that jurisdiction has been established definitively in a case in which this Court has already denied a writ of certiorari. See Utah v. Ute Indian Tribe, 479 U.S. 994 (1986). Of similar importance, the rights, interests and expectations of Reservation residents have been established in reliance on the Tenth Circuit's decision for more than seven years. The Tribe has a vital concern that those rights, interests and expectations not be disrupted. In addition, as the prevailing party in Ute Indian Tribe v. Utah, supra, the Tribe has a significant interest in ensuring that the judgment of the Tenth Circuit, obtained after

10 years of costly litigation, is protected from collateral attack, particularly in an action in which the interests and views of neither the Tribe nor its members were represented.



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## STATEMENT OF THE CASE

In 1975, the Ute Indian Tribe, under authority of its constitution,[1] promulgated the Ute Law and Order Code. Under the Code, and as authorized by federal law, the tribal court exercises civil and criminal jurisdiction throughout the original boundaries of the Uintah and Ouray Reservation[2].

Publication of the Code raised immediate protest from the State of Utah and from the political subdivisions located within the original boundaries of the Reservation. See Ute Indian Tribe v. Utah, 521 F.Supp. 1072, 1077 (D. Utah 1981), aff'd in part, rev'd in part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). Some officials went so far as to encourage their

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[1] Article VI, § 1(k) of the Constitution of the Ute Indian Tribe authorizes the Tribal Business Committee to establish a "Reservation Indian court" for "the maintenance of law and order and the administration of justice" within the Reservation.

[2] The present Uintah and Ouray Reservation is comprised of two separate but contiguous reservations established for the use and occupancy of the Ute Indians. The Uintah Valley Reservation was established by Executive Order of October 3, 1861, as confirmed by the Act of May 5, 1864, ch. 77, 12 Stat. 63. The Uncompahgre Reservation was established by Executive Order of January 5, 1882. Only the boundary of the Uintah Valley Reservation is at issue in this action.

constituents to openly resist enforcement of the Tribe's Code. 521 F.Supp. at 1078.

**Ute Indian Tribe v. Utah**

In order to establish, once and for all, the exterior boundaries of the Reservation, the Tribe filed an action for declaratory relief in the Federal District Court for the District of Utah in 1975. Full participants to the proceedings included the Tribe as plaintiff; State of Utah, as a defendant-intervenor; the Counties of Duchesne and Uintah and the Cities of Duchesne and Roosevelt as defendants; and the United States as amicus curiae.[3]

The issues litigated in Ute Indian Tribe were (1) whether, by various statutes, Congress intended to disestablish portions of the Uintah Valley and Uncompahgre Reservations, and (2) the force and effect of the Tribe's Code within the boundaries of the Reservation. 521 F.Supp. at 1075. The district court held that the Uncompahgre Reservation had been disestablished, but that the Uintah Valley

[3] The United States supported the Tribe's position that the Uintah Valley Reservation had not been disestablished. The Tribe is not aware of any change in fact or law that would indicate the United States has since altered its position on this issue.



Reservation remained largely intact. The Tribe and State filed cross appeals to the United States Court of Appeals for the Tenth Circuit.

On appeal, a two-judge majority of a panel of the Tenth Circuit initially ruled that substantial portions of the Uintah Valley Reservation had been disestablished. See Ute Indian Tribe v. Utah, 716 F.2d 1298 (10th Cir. 1983), rev'd, 773 F.2d 1087 (10th Cir. 1985) (en banc). However, on rehearing in light of this Court's intervening decision in Solem v. Bartlett, 465 U.S. 473 (1984), a majority of the Tenth Circuit, sitting en banc, ruled that the Uintah Valley Reservation had not been disestablished, but had been diminished with respect to two parcels of land not at issue in this case. See 773 F.2d 1087 (10th Cir. 1985) (en banc). The defendants, including the State of Utah, sought review by this Court, but the writ of certiorari was denied. See Utah v. Ute Indian Tribe, 479 U.S. 994 (1986). Unhappy with this Court's denial of review of the Tenth Circuit's decision, the State has continued to raise the boundary issue at every opportunity.

**State v. Hagen**

The present case was initiated in 1988, when

the State of Utah filed an information against Robert P. Hagen, charging him with distribution of a controlled substance for value, to wit: marijuana, a third-degree felony. The alleged crime took place in Myton, Utah, which is located within the exterior boundaries of the Reservation, as those boundaries had been confirmed by the Tenth Circuit in Ute Indian Tribe. The initial charges against the defendant were dismissed, without prejudice, when the State learned that the defendant was being prosecuted in federal district court for the same offense.

The federal action against Hagen was dismissed for lack of jurisdiction, after the court determined that Hagen was not an Indian for criminal jurisdiction purposes. The State then refiled the same charges against him.

Hagen entered a plea of guilty, but subsequently filed a motion to arrest judgment and withdraw his plea. Even though Hagen had earlier prevailed on his argument that the federal court lacked jurisdiction to prosecute him on the ground that he was not Indian, Hagen now argued that the State lacked jurisdiction over the offense on the grounds that he was Indian and the alleged crime



had been committed on the Reservation.

Following an evidentiary hearing, the trial court denied Hagen's motion to arrest judgment and withdraw his plea. Transcript of Hearing at 25-26, lines 25-04, State v. Hagen, [hereafter, "T.__, lines _"].[4] The court determined that Hagen was not an Indian for purposes of criminal jurisdiction because he was not a member of a federally recognized tribe.[5] T.25, lines 13-16. The court expressly declined to address the issue of whether the locus of the crime was within the Reservation.[6] T.25, lines 12-13. On appeal, the Utah Court of Appeals ruled that the trial court had applied the improper standard

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[4] Relevant portions of the transcript are included in Appendix I to the Petition for Writ of Certiorari, Hagen v. State of Utah, No. 92-6281 (filed October 15, 1992) [hereafter, "Pet. at ___"].

[5] Hagen is a member of the Little Shell Band of Chippewa Indians, which has not been recognized by the United States. See 51 Fed. Reg. 25,115 (1986).

[6] Indeed, the trial court judge acknowledged that "[i]f the question of Reservation status had to be addressed this court would have to withdraw," because the judge, who had represented Duchesne County in the Ute Indian Tribe litigation, had "spent a good part of ten years arguing that very question, and quite frankly [] already ha[d his] mind made up on that point." T. 25, lines 16-20.

and burden of proof by requiring Hagen to establish, by clear and convincing evidence, that he was Indian. State v. Hagen, 802 P.2d 745 (Utah App. 1990), rev'd on other grounds, No. 910017, slip op. (Utah July 17, 1992). For that reason alone, the Utah Court of Appeals reversed Hagen's conviction. Id. at 747.

The Utah Supreme Court declined to address Hagen's status as an Indian. Instead, on the basis of its decision in State v. Perank, No. 860243, slip op. (Utah July 17, 1992), discussed below, the court summarily ruled that the State had properly exercised jurisdiction over Robert Hagen, because the offense with which he was charged had been committed outside the boundaries of the Reservation.[7] See State v. Hagen, No. 910017,

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[7] Until it reached the Utah Supreme Court, the only issues litigated in the Hagen case were whether Hagen was Indian for criminal jurisdiction purposes, and whether the trial court had applied the proper standard and allocation of the burden of proof in determining that he was not Indian. In declining the State's suggestion that it defer ruling in the Hagen case pending the Utah Supreme Court's resolution of the boundary issue in Perank, the Utah Court of Appeals stated:

> [t]he Tenth Circuit's decision does not appear to hold
>
> (continued...)



slip op. Although it involved a question that had been litigated in Ute Indian Tribe, and affected the jurisdictional authority of the Tribe and the United States, the decision in the Hagen case was rendered without any participation by those two sovereigns.[8]

**State v. Perank**

Perank involved another criminal prosecution that arose in Myton, Utah, and concerned a defendant who belatedly claimed to be Indian. In that action, the State encouraged the Utah Supreme

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[7](...continued)

> open any role for the state courts in refining its holding in Ute Indian Tribe . . . [W]e are hard pressed to see how, given the Supremacy Clause and the doctrine of collateral estoppel, our state courts could reach a contrary decision [on the Reservation-boundary issue] that would have any practical effect.

802 P.2d at 747. The State appealed this dicta to the Utah Supreme Court, raising the Reservation-boundary issue for the first time in the Hagen case.

[8] The petitioner suggests that the Tribe "had a full and fair opportunity" to litigate the Reservation-boundary issue in the State court proceedings. See Pet. at 7. While the Tribe, State and United States did have a full and fair opportunity to litigate the issue in federal court, the Tribe did not appear as a party or otherwise in the Hagen case. The Tribe did appear as amicus in the Perank case, but only on the issue of Perank's status as an Indian and only after the Utah Supreme Court had heard oral argument in that action. See State v. Perank, slip op. at 43 (Zimmerman, J., dissenting).

Court to conclude, contrary to the 1985 en banc decision of the Tenth Circuit, that the Uintah Valley Reservation had been disestablished so as to preclude federal and/or tribal jurisdiction over crimes committed by Indians on non-trust lands within the Reservation.

The case arose in 1983, when Clint Perank entered a guilty plea to a charge of third-degree burglary in Myton, Utah. At the time, Perank was not enrolled or eligible for enrollment in the Ute Indian Tribe, the only tribe with which he claimed any affiliation.

Perank's sentence on the burglary offense was commuted to probation. In 1986, at a revocation-of-probation hearing, Perank asserted for the first time that the State lacked jurisdiction to prosecute him for his probation violation or the underlying burglary offense, arguing that he was Indian and the crime had been committed within the boundaries of the Reservation.

The State introduced no evidence challenging Perank's assertion that he was Indian for jurisdictional purposes. Thus, the trial court had virtually no choice but to rule that Perank was an



Indian for criminal jurisdiction purposes. As the State was aware, only after making that ruling could the trial court go on to address the question of whether the Uintah Valley Reservation had been disestablished.

After hearing oral argument in Perank's appeal, the Utah Supreme Court invited the Tribe to file an amicus brief in the Perank case. The Tribe confined its arguments to a vigorous assertion that Perank was not a member of, and was not eligible for membership in, the Tribe, and therefore was not an Indian for purposes of criminal jurisdiction. Remarkably, the State filed an 8-page reply brief arguing, contrary to the very Indian tribe in which Perank claimed membership, that Perank was Indian for jurisdictional purposes.[9]

The Utah Supreme Court ultimately affirmed Perank's Indian status, and went on to rule that the

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[9] Its failure to introduce any evidence during the trial on Perank's legal status as a non-Indian and its vigorous assertion on appeal that Perank was an Indian demonstrates that the State's main interest in revoking Perank's probation was in relitigating the Reservation-boundary issue, not in getting an offender off the streets.

Uintah Valley Reservation had been disestablished so as to exclude Myton, Utah, from the Reservation boundaries. Based upon that finding, the court concluded that the State had properly exercised jurisdiction over Perank. See State v. Perank, slip op., supra.

**Ute Indian Tribe v. Utah (Revisited)**

Upon learning of the Utah Supreme Court's decisions in Perank and Hagen, the Tribe filed a renewed motion for injunctive relief in the Federal District Court for the District of Utah.[10] In its

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[10] During the original Ute Indian Tribe proceeding, the district court had denied the Tribe's motion to enjoin the State and its political subdivisions from interfering with the Tribe's lawful exercise of jurisdiction within the Reservation. However, foreseeing that the State would be dissatisfied with, and might resist, the federal court's decision, the court retained continuing jurisdiction over the action, stating:

> [t]he denial of injunctive relief at this point, however, is a denial without prejudice. If circumstances shall arise that justify invoking the exercise of this Court's equitable powers, the Court stands ready to exercise such continuing jurisdiction upon the making of an appropriate record, and to enter such orders as are necessary to effectuate its judgment, or as are needed in aid of its jurisdiction.

Ute Indian Tribe v. Utah, 521 F.Supp. at 1157 (emphasis (continued...)



motion, the Tribe asked the district court to enjoin the Utah Supreme Court from issuing the remittitur, and thereby entering as final, its decision in State v. Perank.

A hearing on the Tribe's motion was held on August 3, 1992. At that time, the parties stipulated that the State and its political subdivisions would refrain from enforcing the Utah Supreme Court's decision in State v. Perank or from exercising criminal jurisdiction over Indians who are members of any federally recognized Indian tribe or from interfering in any way with the Tribe's lawful exercise of civil and criminal jurisdiction within the boundaries of the Reservation, as those boundaries were confirmed by the Tenth Circuit in Ute Indian Tribe. The stipulation was incorporated into an Order of the Court on September 2, 1992, nunc pro

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[10](...continued)
added). The emphasized comments, which mirror the language of the Anti-Injunction Act, 28 U.S.C. § 2283, suggest that the district court believed that the appropriate authority for compelling the State's compliance with the federal courts' decision on the reservation-boundary issue was that Act. See discussion infra at 15-18.

tunc August 3, 1992.[11]

On the day following the federal court hearing, the Utah Supreme Court issued a Minute Order staying issuance of the remittitur and finality of the judgment of the Court in State v. Perank "pending (1) the conclusion of any proceedings on certiorari to the United States Supreme Court and (2) the final disposition of the injunctive proceedings pending in the United States District Court for the District of Utah." See Minute Entry, State v. Perank, No. 860243 (Utah entered Aug. 4, 1992). A similar order staying effect of the judgment in State v. Hagen was issued on August 18, 1992.[12]

## REASONS FOR DENYING THE WRIT

### I. It Would Be Premature for this Court to Involve Itself in this Action.

There is an ongoing federal district court proceeding that is now addressing the issues raised in this action. The federal district court has already enjoined enforcement of the Utah Supreme Court's

[11] The Order and Stipulation are attached as Appendix B.

[12] The stays entered in State v. Perank and State v. Hagen are included as Appendix C.



decision in State v. Perank, and has set a briefing schedule and hearing for oral argument on the Tribe's motion for a permanent injunction. The Utah Supreme Court, itself, has stayed the finality of its decisions in State v. Perank and State v. Hagen, pending the outcome of the federal district court action.[13] If this Court were to now grant certiorari,

[13] In petitioning the district court for injunctive relief, the Tribe was particularly concerned with jurisdictional conflicts that could arise should the State or its subdivisions rely on the Perank decision. The Tribe's concerns were alleviated by the district court's preliminary injunction and Utah Supreme Court's stay. Accordingly, there is no immediate jurisdictional conflict or "volatile" situation that this Court must step into to resolve, as suggested by petitioner and respondent. See Pet. at 11-12; State of Utah's Brief in Support of Petition for Writ of Certiorari at 11-12, Hagen v. State, No. 92-6281 (filed Nov. 6, 1992) [hereafter "State's Br. at __"].

Similarly, Hagen's actions - in asserting, in federal court, that he was non-Indian, then asserting in State court that he was Indian - demonstrate that, contrary to the State's claim, the problem of "criminal defendants charged in state court claim[ing] they should be in federal court, and vice versa", State's Br. at 12, pre-existed issuance of the Utah Supreme Court's conflicting decisions on the Reservation-boundary issue. Therefore, it is not a problem that was caused by the issuance of the Perank and Hagen decisions, nor is it a problem that would be resolved by this Court's granting the petition for writ of certiorari.

Nor will the extensive record on the Reservation-boundary issue "go by the wayside", see State's Br. at 13, if the boundary issue is not resolved by this Court on this petition for writ of certiorari. The federal district court proceeding

(continued...)

it would deprive the district court of the specific remedy, afforded by Congress in the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283, to protect and effectuate its prior judgment addressing the boundaries of the Reservation. The Court would also deprive the Tribe of its remedy, under the same Act of Congress, to protect the federal court judgment it obtained after 10 years of costly litigation, in which all parties with an interest in the outcome of the litigation were fully and fairly represented.

Moreover, if the Court granted certiorari in this case, it would be sending a strong message that the judgments of lower federal courts, involving federal law issues of such major import and significance as the boundaries of an Indian reservation, are not final and conclusive, and can be relitigated at will in state courts, even in the most minor of criminal cases. The Court's message would require every Indian tribe interested in protecting a federal-court judgment

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[13](...continued)
involves the very same record, and will resolve the primary issue in this action, to wit: whether the State is precluded from relitigating the boundary issue.



construing reservation boundaries to involve itself in literally every criminal proceeding or jurisdictional conflict arising on its reservation and involving not only its own tribal members, but also anyone claiming to be Indian.

**A. The Writ of Certiorari Should Be Denied Because the Issues Presented for Review Are Now Pending Before the Federal District Court for the District of Utah.**

The pending district court proceeding that is now addressing the issues raised by this action was initiated by the Tribe when it filed a motion in the Federal District Court for the District of Utah pursuant to the "relitigation exception" to the Anti-Injunction Act. In its motion, the Tribe asked the district court to enjoin the Utah Supreme Court from issuing the remittitur, and thereby entering as final its judgment, in State v. Perank. See Renewed Motion for Injunctive Relief, Ute Indian Tribe v. Utah, No. C-75-408J (D. Utah filed July 31, 1992).

The Anti-Injunction Act, 28 U.S.C. § 2283, generally prohibits a federal court from interfering with proceedings in the state courts. See Choo v. Exxon Corporation, 486 U.S. 140, 145 (1988). The Act, which has existed in some form since 1793,

see Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335, is a natural corollary to Congress' decision to implement a dual system of federal and state courts. Obviously, this dual system could not function if state and federal courts were free to vie with each other for control over a particular case or issue. Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286 (1970). By generally barring frequent federal court intervention in state court proceedings, the Act forestalls "needless friction between state and federal courts". Oklahoma Packing Co. v. Gas Co., 309 U.S. 4, 9 (1940).[14]

Congress, however, has permitted injunctions in certain, specific circumstances, namely when an injunction is expressly authorized by statute; where necessary in aid of the federal court's jurisdiction; or where necessary to protect or effectuate the federal court's judgment. Choo v. Exxon Corp., 486 U.S. at

[14] Ironically, in the case now before this Court, it is a decision of the majority of the Utah Supreme Court to ignore principles of comity and federalism and to decline to defer to the Tenth Circuit's resolution of the boundary issue that has created the "needless friction between state and federal courts" that the Anti-Injunction Act was designed to avoid.



146. The third exception - termed the "relitigation exception" - was "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." Id.

The relitigation exception is intended to "ensure the effectiveness and supremacy of federal law", 486 U.S. at 146, and is "founded in the well-recognized concepts of res judicata and collateral estoppel". Id. at 147. Thus, in addition to permitting federal courts to effectuate their prior judgments, the relitigation exception is designed "to relieve [the prevailing party in a federal court action] of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980), quoting Montana v. United States, 440 U.S. 147, 153-54 (1979).

This Court has recognized that the federal district courts are best suited to determine whether state or federal law bars a party from raising, in a subsequent state court proceeding, an issue that previously has been presented to and decided by the

federal courts. See Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 525-26 (1986). This Court has also concluded that the federal district courts are in the best position to determine whether, under the relitigation exception to the Anti-Injunction Act and general principles of equity, comity and federalism, state courts should be enjoined from deciding an issue that previously was raised and decided by the federal courts. Id. at 526.

Given this Court's recognition of the competence and ability of the district courts, and the Tribe's current motion now pending before the Federal District Court for the District of Utah, this Court should deny the writ of certiorari and permit the district court to resolve the paramount issues presented by this unusual case.

**B. The Writ of Certiorari Should Be Denied Because the Doctrine of Collateral Estoppel Precludes the State from Relitigating the Reservation-Boundary Issue.**

As indicated in the Tribe's "Question Presented", the threshold issue in this case is whether the State is collaterally estopped from relitigating the Reservation boundaries. This issue should be resolved by the pending federal district



court proceeding and this Court should deny review in order to allow the district court to make that determination. In addition, collateral estoppel presents another reason why this Court should deny the State another forum in which to relitigate the Reservation-boundary issue.

Under the doctrine of collateral estoppel, once an issue has been actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Montana v. United States, 440 U.S. at 153. The State now asks this Court to review the identical issue that it declined to review in Ute Indian Tribe based, not upon any change in the law, see discussion infra at 28-33, but upon the State's unrelenting claim that the Tenth Circuit was wrong. The State's actions have resulted in repetitious, vexatious and wasteful litigation that the doctrine of collateral estoppel is framed to avoid. As set forth below, each of the criteria for application of the doctrine, see, e.g., Montana, supra; Coffey v. Dean Witter Reynolds, Inc., 961 F.2d 922, 925 (10th Cir. 1992), is fully satisfied in this case.

1. The Reservation-boundary issue advanced by the State is identical to the Reservation-boundary issue decided against the State in Ute Indian Tribe.

The issue litigated by the Tribe, State, counties, cities and United States in Ute Indian Tribe is identical to the issue raised by the petitioner and respondent here. The question common to both actions was whether Congress intended to disestablish the Reservation. The facts relevant to resolving the issue are identical, and concern construction of various Congressional enactments at the turn of the century.[15] Moreover, the legal arguments raised by the State in its brief in support of the petition are virtually identical to those raised when it sought a writ of certiorari in Ute Indian Tribe.

It is of no legal significance that the Reservation-boundary issue was litigated in a civil context in Ute Indian Tribe and in a criminal context

[15] The principle Acts at issue in both Ute Indian Tribe v. Utah and State v. Perank were the Indian Appropriations Act of 1902, Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Indian Appropriations Act of 1905, Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70. See State v. Perank, slip op. at 19, 25.



in State v. Hagen. Resolution of the issue turns on identical facts, i.e., construction of the 1902 and 1905 Indian Appropriations Acts. See Ute Indian Tribe v. Utah, 773 F.2d at 1089. Collateral estoppel bars a government from relitigating, in a subsequent criminal action, an issue that was actually and necessarily decided against it in a prior civil proceeding. Yates v. United States, 354 U.S. 298, 335 (1957) (overruled on other grounds); United States v. Rogers, 960 F.2d 1508 (10th Cir. 1992). Cf. Ashe v. Swenson, 397 U.S. 436, 443 (1970) ("when an issue of ultimate fact has once been determined by a valid final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.") (emphasis added).

2. The judgment in Ute Indian Tribe was final.

This Court's denial of certiorari in Ute Indian Tribe did not, as the State suggests, render the Tenth Circuit's decision less than dispositive on the Reservation boundary issue.[16] To the contrary, a denial of certiorari establishes the finality of the

[16] Under the State's rationale, the finality of every case for which this Court denies a writ of certiorari is brought into question. See discussion infra at 27-29.

decision from which appeal was sought. See Dairy Distributors, Inc., v. Western Conference of Teamsters, 294 F.2d 348, 352 (10th Cir. 1961).[17]

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[17] When it asserts that the Tenth Circuit misapplied this Court's "fairly clean analytical structure", see State's Br. at 14, the State grossly distorts the en banc and district courts' findings that the Uintah Valley Reservation was not disestablished. Ever since the Ute Indian Tribe litigation was initiated, the State has maintained that the Act of May 27, 1902, 32 Stat. 245, effected the opening of the Reservation. The 1902 Act contains language restoring the to-be-opened lands to the public domain. However, the 1902 Act was not the controlling legislation leading to the district court's and Tenth Circuit's decisions in Ute Indian Tribe.

The Tenth Circuit has acknowledged that, had it determined that the 1902 Act opened the Reservation, it, too, would have found that Congress intended to disestablish the Reservation. See Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1287, 1400 (10th Cir. 1990), cert. denied, _ U.S.__, 111 S.Ct. 581 (1990). However, the Tenth Circuit rejected the State's argument that the 1902 Act opened the Reservation, determining, on the basis of the voluminous evidence and briefs before it, that the Act of March 3, 1905, 33 Stat. 1048, effected the opening of the Reservation. In part because the 1905 Act contained no language restoring the opened lands to the public domain, the Tenth Circuit concluded, as had the district court, that Congress did not intend to disestablish the Reservation.

While the State would have this Court believe that the Tenth Circuit misapplied Supreme Court precedent, see State's Br. at 14-26, when stripped of its veneer, the State's argument is basically a complaint that the Tenth Circuit rejected the State's argument that the 1902 Act opened the Reservation. That same complaint formed the basis of the petition for writ of certiorari that the State filed, and this Court denied, in Ute Indian Tribe. No "new" reason exists to once again allow the (continued...)



In announcing its en banc decision, the Tenth Circuit expressly held:

> The . . . Act [of May 27 1902, 32 Stat. 245] would have returned all surplus Uintah Reservation lands to the public domain if the Ute Tribe's consent could be obtained. That consent was never forthcoming. The Tribe refused all requests to give up their lands . . . . Finally Congress passed the . . . Act [of March 3, 1905, 33 Stat. 1048], opening the Reservation for non-Indian settlement under the homestead and townsite laws. This measure, which actually effected the opening of the Reservation, did not contain the public domain language used in the 1902 Act.
>
> It is not possible to find that the series of congressional enactments summarized above revealed a "baseline purpose of disestablishment," . . . that carried through into the 1905 Act.
>
> * * *
>
> The . . . conclusion [of the Tenth Circuit panel] that the Uintah Reservation was diminished by the 1905 Act is not correct. Indeed, we

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[17](...continued)
State to advance an argument - that the 1902 Act opened the Reservation - that has failed on at least three previous occasions in the federal courts.

> accept the district's court view that the Reservation's boundaries were not changed by the 1905 Act.

Ute Indian Tribe v. Utah, 773 F.2d at 1089.

This unequivocal statement is a final ruling on the merits of the issue of disestablishment of the Reservation. The State of Utah is bound by that decision and is precluded from raising and seeking to relitigate the issue in this or any other court.

3. The State was a party to the Ute Indian Tribe litigation.

When the Tribe initiated the Ute Indian Tribe litigation in 1975, the named defendants were Duchesne County and the Cities of Roosevelt and Duchesne. The State voluntarily intervened as a party-defendant in 1976.[18] See Ute Indian Tribe v. Utah, 521 F.Supp. at 1078. Merely because the federal courts rendered a decision contrary to the position advanced by the State does not absolve the State from being bound by the federal court's decision. Cf. Montana v. United States, 440 U.S. at 163 (precluding the federal government from relitigating an issue of federal law in federal court

[18] Uintah County was joined as a defendant in 1979.



after the government had submitted to adjudication of its federal claims in a state forum and the state court had ruled adversely to the government); England v. State Board of Medical Examiners, 375 U.S. 411, 419 (1964) (same).[19] Considerations of comity, as well as repose, militate against permitting relitigation of a federal issue in a state forum at the behest of a party who chose to litigate that issue in federal court in the first instance.

4. The State had a full and fair opportunity to, and did, vigorously litigate the Reservation-boundary issue in Ute Indian Tribe.

The State has not alleged any procedural impropriety, such as would justify relitigation of the Reservation-boundary issue, in the federal courts' handling of Ute Indian Tribe. Cf. Montana v. United States, 440 U.S. at 164 n.11 (ruling that collateral estoppel is not applicable where there is reason to

[19] Had the State wanted to participate in the Ute Indian Tribe litigation, but not be bound by the decision of the federal courts on the Reservation-boundary issue, it could have intervened as an amicus curiae. See Kerr-McGee Chemical Corporation v. Hartigan, 816 F.2d 1177 (7th Cir. 1987) (holding that the State of Illinois was not bound by the decision of a federal court issued in a prior action in which the State participated as an amicus curiae).

doubt the "quality, extensiveness, or fairness of procedures followed in prior litigation"). Rather, the only "impropriety" alleged by the State is the Tenth Circuit's failure, sitting en banc, to rule that the Reservation had been disestablished. See State's Br. at 16-24.

In reaching its decision on the Reservation-boundary issue, the district court conducted a two-day trial; took testimony from 18 witnesses; and admitted more than 800 documentary exhibits.

> Besides giving careful scrutiny to these documents and the record at trial, t[he district] court [] studied the extensive pretrial memoranda and post-trial briefs submitted by the parties and the United States as amicus, and [] examined numerous historical documents authenticated in the discovery process but not included in the compilation of joint exhibits offered at trial, and other learned treatises and historical works that [were] relevant to this Court's determinations.

521 F.Supp. at 1080.

The trial record was certified to the Tenth Circuit. Each party and the United States, as amicus, submitted extensive briefs to the Tenth Circuit in support of their respective positions, both when the initial panel considered the case, and again



when it was heard by the court en banc.[20] The State and political subdivi-sions petitioned this Court for review of the Tenth Circuit's final decision.[21]

Obviously, the State vigorously litigated the Reservation-boundary issue, all the way to the highest court in the land. This Court should again reject the State's efforts to relitigate the boundary issue. To do otherwise will bring into question the finality of every decision this Court has been asked, but has declined, to review; would subject the prevailing party in every federal court action to the cost and vexation of defending itself, on the same issue, in multiple lawsuits; would encourage forum shopping by the losing party in federal court litigation, in the hope of finding a state court willing

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[20] The en banc panel noted that "[t]he district court's opinion was indeed well researched on [the question of disestablishment], and other [issues] as well." Ute Indian Tribe v. Utah, 773 F.2d at 1089.

[21] The United States filed a brief in opposition to this Court granting certiorari. In that brief, the United States characterized as "exhaustive" the federal courts' consideration of the Reservation-boundary issue, see Brief of United States at 14-15, Utah v. Ute Indian Tribe, No. 85-1821 (filed Nov. 1986), indicating that the federal government fully supports the en banc decision of the Tenth Circuit that the Uintah Valley Reservation had not been disestablished.

to enter a decision that conflicts with a prior decision of a federal court; and would deprive all federal court decisions of finality, except for those decisions issued by this Court. Such results would wreck havoc on the dual system of courts contemplated by our founding fathers and instituted by the First Congress.

## II. Principles of Comity and Finality Require that the Court Deny the Petition for Writ of Certiorari.

This action is now before this Court as a result of the State's "opportunistic misuse of [a] petty criminal prosecution to readjudicate a settled issue" of federal law. See State v. Perank, slip op. at 42 (Zimmerman, J., dissenting). In proceedings that involved "unequal and inadequate briefing",[22] id., and in which all parties with an interest in the outcome of the litigation were not fully and fairly represented, id. at 43, the State achieved "what it

[22] Justice Zimmerman's dissent contradicts the State's suggestion, see State's Br. at 13, that the Utah Supreme Court considered the Ute Indian Tribe record, which had been certified to that court, when it decided State v. Perank. See slip op. at 42-43 (indicating that the only materials considered by the court were the briefs submitted by the parties and amicus curiae).



has desperately sought for six years - a second shot at persuading the United States Supreme Court to reject the Tenth Circuit's ruling [in Ute Indian Tribe v. Utah, 773 F.2d 1087] and to give Utah control over a large part of the original reservation." Slip op. at 42 (Zimmerman, J., dissenting). This Court should not countenance the State's machinations, which "come[] at an unacceptably high cost to the relationship between the state and federal judiciaries." Id. Instead, the Court should uphold what has been the settled law in Utah for more than seven years, and deny the writ of certiorari.[23]

[23] The State's unabashed efforts (undertaken in proceedings to which neither the Tribe nor the United States was a party) to relitigate, in its own courts, the federal Indian law issues resolved by the en banc decision of the Tenth Circuit is reminiscent of the persistent and occasionally malicious efforts by the State of Washington more than a decade ago to strip its Indian citizens of their rights secured by treaties and statutes.

That State's "extraordinary machinations" to resist federal law, now being repeated in Utah, prompted this Court to comment:

> [e]xcept for some desegregation cases . . ., the district court has faced the most concerted official and private efforts to frustrate a decree of the federal court witnessed in this century. The challenged orders and this appeal must be reviewed by this court in the context of events

(continued...)

## A. This Court's Actions in Solem and DeCoteau Do Not Require that the Court Grant the Petition for Writ of Certiorari in This Proceeding.

In the proceedings below, the State argued that the Utah courts were free to ignore the 1985 en banc decision of the Tenth Circuit in Ute Indian Tribe.[24] The State now urges that same argument

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[23](...continued)
forced by litigants who offer the court no reasonable choice.

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 696 n.36 (1979).

In reviewing the State's attempts to obtain this Court's review of the Reservation-boundary issue, this Court should consider the context created, and forced upon the Court and Tribe, by the State.

[24] The State's argument is based, in part, upon the State's perception that the Tenth Circuit failed to show proper deference to three previous decisions of the Utah Supreme Court, which, the State asserts, decided the disestablishment issue. State's Br. at 9, 11 & n.9. However, in none of the cases relied on by the State had the Reservation-boundary issue been fully raised and considered by the state courts.

Brough v. Appawora, 533 P.2d 934 (Utah 1976), vacated and remanded, 431 U.S. 901 (1977), involved a personal injury action in which the defendant, an enrolled member of the Tribe, claimed to be subject to tribal, rather than State, jurisdiction because the tort had been committed on the Reservation. In deciding the case, the Utah Supreme Court did not consider the relevant Acts of Congress to determine whether they displayed a Congressional intent to disestablish

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[24](...continued)
the Reservation. Rather, in what may well be the most outrageous reported decision (mis)applying this Court's Indian law decisions, the Utah Supreme Court found that the Reservation had been disestablished because, the Court (wrongly) determined, the Tribe had ceased to exist.

> The Ute nation, of the long-ago treaty, no longer exists, and the descendants of the inhabitants of that nation are now citizens of the United States. When a nation ceases to exist, its treaties are no longer of any force or effect, and the descendants of those who constituted the erstwhile nation cannot thereafter claim any benefits under the treaty.

553 P.2d at 935.

Showing complete contempt for this Court's precedents, e.g., Ex parte Crow Dog, 109 U.S. 556 (1883) (confirming tribal jurisdiction over offenses committed by Indians on a reservation), and for Acts of Congress, see 25 U.S.C. §§ 1321, 1322, as amended (requiring tribal consent to a State's assumption of jurisdiction on a reservation), the Utah Supreme Court upheld the trial court's determination that an Indian was subject to state court jurisdiction for a tort committed on the Reservation, under the rationale that:

> [t]o permit an Indian who commits a [tort or crime on the Reservation] to show disdain for the [State] prosecuting officials and claim the sanctuary of the tribal method of procedure is unthinkable.

553 P.2d at 936. After Brough was remanded to the state court for reconsideration in light of this Court's decision in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), the defendant had it removed to federal court pursuant to 28 U.S.C. § 1441. The federal district court later enjoined concurrent state proceedings, in order to aid the federal court's

(continued...)

on this Court. The State's position ignores all principles of comity and finality.

As support for its position that the Utah courts could blatantly ignore the Tenth Circuit's en banc decision in Ute Indian Tribe, the State has repeatedly relied upon this Court's having granted a writ of certiorari to review conflicting decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the State of South Dakota with respect to the boundaries of the Cheyenne River and Lake Traverse Indian Reservations. However, in its argument, the State completely ignores the chronology of the series cases that led this Court to grant review in Solem v. Bartlett, 465

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[24](...continued)
removal jurisdiction. See 28 U.S.C. § 2283.

In Perank, the Utah Supreme Court distinguished Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910), admitting that, "it cannot be said, as a technical matter, that the Sowards opinion specifically addressed the question of whether the Reservation was disestablished." See State v. Perank, slip op. at 38. The dissenting Justice maintains that "the same observation holds true for White Rocks Irrigation Co. [v. Mooseman, 45 Utah 79, 141 P. 459 (1914)]". See slip op. at 44 (Zimmerman, J., dissenting). Thus, "the [State's] implication . . . that [the Utah Supreme Court] has previously ruled on the issue [of Reservation disestablishment and that the federal courts had not granted the state court's ruling proper deference] is simply incorrect." Id.



U.S. 473 (1984) and in DeCoteau v. District County Court, 420 U.S. 425 (1975), and, in contrast to the Utah Supreme Court, the lengths to which the South Dakota Supreme Court went to justify why it departed from prior and conflicting decisions of the federal court on a reservation-boundary issue.

In the series of cases leading to this Court's decision in DeCoteau, the South Dakota Supreme Court issued its decision on the uniquely federal question of the boundaries of the Lake Traverse Reservation before the Eighth Circuit issued its conflicting decision. See DeCoteau v. District County Court, 211 N.W.2d 843 (S.D. 1973), aff'd, 420 U.S. 425 (1975); United States ex rel. Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973), rev'd sub nom DeCoteau v. District County Court, 420 U.S. 425 (1975). Thus, unlike the Utah Supreme Court, the South Dakota Supreme Court did not decide on an issue of uniquely federal law in complete disregard for a previous decision of the federal courts on the same issue.

Similarly, in the series of cases leading to this Court's review of Solem, the South Dakota Supreme Court did not presume, as did the Utah Supreme

Court, to issue a decision contrary to a previous federal court decision on reservation boundaries without legitimate, legal reasons for doing so. Rather, each time that the South Dakota Supreme Court issued a decision finding that the Cheyenne River Reservation had been disestablished, this Court had issued an intervening opinion that reasonably called into question the prior and conflicting decisions of the Eighth Circuit on the reservation-boundary issue. Only on the basis of the intervening decisions of this Court did the South Dakota Supreme Court venture to decide the reservation-boundary issue in conflict with a prior decision of the Eighth Circuit. See Stankey v. Waddell, 256 N.W.2d 117, 119 (S.D. 1977) (finding that this Court's intervening decision in DeCoteau called into question the analysis applied and result reached by the Eighth Circuit in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973)); State v. Janis, 317 N.W.2d 133, 137 (S.D. 1982) (relying on Stern & Gressman, Supreme Court Practice, § 5.12 at 362 (5th ed.), to find that this Court's summary disposition of United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated and remanded, 446 U.S. 980



(1980), reasonably indicated that a majority of Justices found the Eighth Circuit's decision to be "so clearly erroneous as to make oral argument a waste of time," and therefore, not binding on the State court).

This Court has not issued any disestablishment decisions, much less one that casts doubt upon the Tenth Circuit's decision, since the Tenth Circuit decided, and this Court denied the State's petition for writ of certiorari in, Ute Indian Tribe.[25] Consequently, the Utah Supreme Court's

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[25] The State suggests that the Tenth Circuit has criticized its decision in Ute Indian Tribe. See State's Br. at 21-24. Again, the State misreads a decision of the Tenth Circuit.

In Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, the Tenth Circuit distinguished the court's dicta (quoted at State's Br. at 16) regarding restoration language in Ute Indian Tribe, saying:

> we view the comments about restoration language as extraneous because restoration language was not the operative language of the statutes being construed [in Ute Indian Tribe], unlike the situation now before us.

909 F.2d 1400 (emphasis added). Thus, rather than criticizing Ute Indian Tribe, as suggested by the State, Yazzie reiterates the Tenth Circuit's decision that the 1905, rather than the 1902, Indian Appropriations Act opened the Reservation, and that the 1905 Act failed to evidence the requisite

(continued...)

conduct in issuing a decision that directly conflicts with the federal courts' resolution of the Reservation-boundary issue can only be attributed to a complete disregard for the principles of comity that this Court has proclaimed apply in the Indian-law context. E.g., Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987); National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 895 (1985). This Court should deny the petition for writ of certiorari, thereby rejecting the State's, and a majority of the Utah Supreme Court's, blatant disregard for principles that are fundamental to the integrity of this society's judicial system.

**B. Granting the Petition for Writ of Certiorari in this Case Would Conflict with Judicial Principles of Comity and Finality.**

As the chronology set forth above reflects, in issuing its decisions on reservation disestablishment, the South Dakota Supreme Court was always conscious that principles of comity required deference to a federal court decision on the uniquely

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[25](...continued)
Congressional intent to disestablish the Uintah Valley Reservation. See 909 F.2d 1399-1400.



federal law issue of reservation disestablishment. Only when an intervening decision of this Court reasonably called into question a prior federal court decision on the disestablishment issue, did the South Dakota Supreme Court hazard to upset the federal courts' decision on the federal law issue.

By contrast, at the urging of the State, a majority of the Utah Supreme Court displayed no similar deference to principles of comity. See State v. Perank, slip op. at 43 (Zimmerman, J., dissenting). Instead, without this Court having issued any intervening "disestablishment" decisions, and in full recognition that a majority of the entire Tenth Circuit had applied prior "disestablishment" precedent of this Court in reaching its decision in Ute Indian Tribe, the Utah Supreme Court decided an issue contrary to, and in complete disregard for, the Tenth Circuit's earlier decision on the identical, and uniquely federal, issue of reservation disestablishment.[26]

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[26] In addition to chronology, there is a significant fact that distinguishes the Solem and DeCoteau series of cases from the instant proceedings. In none of the cases leading up to Solem or DeCoteau had the State of South Dakota voluntarily (continued...)

In asking the Utah Supreme Court to ignore the previous decision of the Tenth Circuit resolving the boundary issue, the State did not argue that the Tenth Circuit's decision contravened the laws or policies of the State, see State v. Perank, slip op. at 44 (Zimmerman, J., dissenting), which is an acceptable basis for not deferring to another court's resolution of an issue. Id. Rather, the State asked the court to revisit the boundary issue "for the sole purpose of creating a conflict with the federal courts to force Supreme Court review." Id. at 45. A majority of the Utah Supreme Court's acquiescence to the State's request "needlessly upsets a

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[26](...continued)
intervened in a federal court action, filed by the affected tribe, in which the sole issue litigated was whether reservation boundaries had been disestablished, and, being dissatisfied with the decision of the federal court, attempted to relitigate the reservation-boundary issue in state court.

By contrast, in the instant proceedings, the State of Utah voluntarily submitted to the jurisdiction of the federal courts when it intervened in the Ute Indian Tribe litigation, and therefore consented to being bound by the federal courts' decision on the issue of disestablishment of the Uintah Valley and Uncompahgre Reservations. Virtually immediately after the federal court decided the issue against it, the State initiated proceedings to upset the federal courts' decision in its own courts, without the participation of its principle adversary, the Tribe, and in complete disregard for principles of comity and federalism.



previously settled area of law and . . . encourages litigants to forum shop in the hope of inconsistent decisions, an ill comity seeks to avoid in the federal-state context." Ibid. If this Court were to acquiesce to the State's request that it review the Utah Supreme Court's decision on the Reservation-boundary issue, the Court could find itself inundated with reservation-boundary cases, a result that the State appears to desire. See State's Br. at 13-24 (suggesting this Court must determine, in each instance, whether the particular act(s) opening a certain reservation did or did not disestablish the reservation).[27]

This Court should uphold the doctrine of comity and discourage parties from relitigating previously settled issues, in the hope of obtaining

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[27] Between 1960 and 1990, there were at least 27 reported state and lower federal court decisions involving reservation boundaries. This Court granted the writ of certiorari to review five of those decisions. See Solem v. Bartlett, 465 U.S. 473 (1986); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 45 (1962). Under the State's theory, the Court would have had to accept every one of the 27 cases before there would be any certainty as to the boundaries of the affected reservations.

inconsistent decisions and "forcing" review by this Court, by denying the writ of certiorari in this action.[28]

### III. This Court Should Deny the Petition for Writ of Certiorari Because the State Possesses, and Has Always Possessed, Criminal Jurisdiction Over Hagen Based on His [Non-]Indian Status

The Reservation boundaries are irrelevant to the criminal jurisdiction issue in this case. The State has always possessed criminal jurisdiction over Robert Hagen because he is a non-Indian for legal purposes.[29] With limited exceptions not relevant to these proceedings, state courts have jurisdiction to prosecute a non-Indian for an offense committed in Indian country where the victim is not Indian. See New York ex rel. Ray v. Martin, 326 U.S. 496 (1946); United States v. McBratney, 104 U.S. 621 (1882).

The term "Indian" has been defined since 1934 as consisting of:

> all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.[30]

25 U.S.C. § 479 (emphasis added). Those groups that are not "recognized" by the United States, pursuant to this definition, are not Indian tribes and their members, accordingly, are not "Indian".[31]

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[28] To its credit, the Utah Supreme Court seems to have retreated from its defiance of comity principles. On August 4, 1992, the court stayed the finality of its decision in State v. Perank, pending the federal district court's determination on the Tribe's renewed motion for injunctive relief, which is based on the relitigation exception of the Anti-Injunction Act. By staying its decision, pending the outcome of the federal court proceedings, the Utah Supreme Court has indicated a willingness to defer to the federal courts on the issue of whether, by its voluntary participation in the Ute Indian Tribe litigation, the State is precluded from relitigating the Reservation-boundary issue in state court.

Thus, rather than having "ominous" consequences, as suggested by the State, see State's Br.at 12, the Tribe's having availed itself of an equitable remedy afforded by Congress may have assisted in averting a clash between the federal and state courts in Utah.

[29] The Tribe does not dispute that Robert Hagen may be Indian for ethnological purposes.

[30] The Utah Court of Appeals found that Robert Hagen possesses 5/16ths degree of Indian blood. See State v. Hagen, 802 P.2d at 747.

[31] See Morton v. Mancari, 417 U.S. 535, 553 n. 24 (1974) (recognizing federal criminal jurisdiction does not extend to (continued...)

The federal government considers an "Indian" to be only those persons who are, or who are descended from, members of Indian tribal entities that are "recognized" by the United States. See 25 U.S.C. § 450b(b) and (c) (defining Indian as a person who is a member of an Indian tribe, and Indian tribe as any tribe, band, nation or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians).[32] As an example, the Bureau of Indian

[31](...continued)
many persons who can be racially classified as "Indian"); United States v. Heath, 509 F.2d 16 (9th Cir. 1974) (finding a member of the terminated Klamath Indian Nation not "Indian" for purposes of federal criminal jurisdiction); St. Cloud v. United States, 702 F.Supp. 1456, 1466 (D.S.D. 1988) (holding that a member of the terminated Ponca tribe is not subject to federal jurisdiction under the Major Crimes Act, 18 U.S.C. §§ 1153, 3242). See also State v. Gardner, 827 P.2d 980 (Utah App. 1992) (finding a terminated Ute, see 25 U.S.C. § 677a, to be subject to state jurisdiction for an offense committed on the Uintah and Ouray Reservation).

[32] The "recognition" requirement, first established in the Indian Reorganization Act and carried through in the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n, also applies in numerous other Indian programs. E.g., Indian Health Care Act, 25 U.S.C. §§ 1601-1680; Indian Financing Act, 25 U.S.C. §§ 1451-1543; Indian Child Welfare Act, 25 U.S.C. §§ 1901-1923.



Affairs' Courts of Indian Offenses, which serve as Indian courts on 22 reservations, follow this rule by restricting their scope of criminal jurisdiction to "any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction . . .". 25 C.F.R. § 11.2(c) (1991) (emphasis added).

In order to clarify which Indian entities are "recognized" by the United States, the United States Department of the Interior has published a list of Indian groups recognized as having a special relationship with the United States. See 51 Fed. Reg. 25,115 (1986). The only persons eligible for services administered by the Bureau of Indian Affairs, and thus the only persons whom the BIA considers to be "Indian", are those individuals who are members of the identified Indian tribes.

Robert Hagen has not been adjudicated an "Indian" for purposes of federal or state criminal jurisdiction, and indeed could not and cannot be.[33] The trial court, in fact, found that the State

[33] As noted, originally the United States attempted to criminally prosecute Hagen. This prosecution was dismissed, however, when the authorities discovered that Hagen was a member of a "non-recognized" Indian tribe, thereby making him a non-Indian for purposes of federal criminal jurisdiction.

possessed jurisdiction over Hagen, regardless of the situs of the offense, because he was not an Indian. See T. 25, lines 12-13.[34]

All parties to the proceedings acknowledge that Hagen's only Indian affiliation is as a member of the Little Shell Band of Chippewa Indians. The Little Shell Band of Chippewa Indians is not a federally recognized Indian tribe. See 51 Fed. Reg. 25,115 (1986). Accordingly, neither Hagen nor the Little Shell Band are eligible for services from the Bureau of Indian Affairs nor are they recognized as satisfying the requirements for being "Indian" for purposes of federal civil or criminal statutes. See 25 U.S.C. §§ 450b, 479, 1452(b), 1603 and 1903(3) and (8). As a consequence, there never has been, and is not now, any question that the State had criminal jurisdiction to prosecute Hagen for proscribed

[34] While the Utah Court of Appeals reversed the trial court's determination on the grounds that it had improperly allocated the burden of proof and applied an improper standard of proof, the court declined to expressly find Robert Hagen to be an Indian. See State v. Hagen, 802 P.2d 745. Moreover, although the State argued that "the central issue in this case is whether [Robert Hagen] is an Indian", see Reply Brief of Appellee at 2, State v. Hagen, No. 910017 (Utah filed Dec. 27 1991), the Utah Supreme Court failed to decide the issue.



conduct occurring within the boundaries of the Reservation. United States v. McBratney, 104 U.S. 621; United States v. Rogers, 45 U.S. 567 (1845). Therefore, the issue of the continued existence of the Reservation is not germane to Hagen's conviction and is not a question that should be decided by this Court on a writ of certiorari.[35]

## CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari, and permit the Federal District Court for the District of Utah to resolve the issues presented in this action.

[35] It is the Tribe's position that Robert Hagen is not an Indian for jurisdictional purposes, and that the Court should decline to review a case that jeopardizes the Tribe's governmental authority when that review is not necessary or called for. However, if the Court were to grant the writ of certiorari, it should summarily vacate the decision of the Utah Supreme Court, for the reason that a member of a tribe that is not "federally recognized" is not an "Indian" for purposes of criminal jurisdiction. Alternatively, the case should be remanded for a determination by the trial court, applying the proper standard and allocation of proof, on the claimed "Indian" status of Robert Hagen.

Respectfully submitted,

Robert S. Thompson, III
Counsel of Record
Sandra Hansen
Jeanne S. Whiteing
Tod J. Smith
WHITEING & THOMPSON
1135 Pearl Street, Suite 203
Boulder, Colorado 80302
(303) 444-2549

Counsel for Amicus Curiae
Ute Indian Tribe

# APPENDICES

# APPENDIX A

OFFICE OF THE ATTORNEY GENERAL
STATE OF UTAH
PAUL VAN DAM
ATTORNEY GENERAL

November 10, 1992

Ms. Sandra Hansen
WHITEING & THOMPSON
Attorneys at Law
1136 Pearl Street, Suite 203
BOULDER< CO 80302

Re: Hagen v. Utah,
United States Supreme Court No. 92-6281

Dear Sandy:

Enclosed herewith is the consent letter you requested in the above-entitled action.

Best regards.

Very truly yours,

/s/ MICHAEL M. QUEALY
Assistant Attorney General

Enclosure
MMQ/jr

OFFICE OF THE ATTORNEY GENERAL
STATE OF UTAH
PAUL VAN DAM
ATTORNEY GENERAL

November 10, 1992

The Honorable William H. Rehnquist
Chief Justice
United States Supreme Court
1 First Street, N.E.
WASHINGTON, DC 20543

Re: Hagen v. State of Utah, U.S. Supreme Court No. 92-6281, On Petition for Writ of Certiorari

Dear Mr. Chief Justice:

Pursuant to Supreme Court Rule 37.2, this letter will serve as written consent of Respondent State of Utah to the filing of a brief amicus curiae by the Ute Indian Tribe in the above-referenced action throughout these proceedings, including the period prior to this Court's consideration of the Petition for Writ of Certiorari.

Respectfully yours,

/s/ MICHAEL M. QUEALY
**(Counsel of Record)**
Assistant Utah Attorney General

MMQ/jr



Joel D. Berrett
Attorney at Law
58 East 100 North
P.O. Box 262
Roosevelt, Utah 84066

November 3, 1992

Sandy Hansen
1136 Pearl Street, Suite 203
Boulder, Colorado 80302

RE: Hagen v. Utah

Dear Sandy:

Enclosed herewith please find the consent letter which I have signed allowing you to file Amicus Curiae Briefs in the above matter. If you have any questions, please contact me.

Yours very truly,

/s/ Joel D. Berrett
Joel D. Berrett
Attorney at Law

Enclosure

The Honorable William H. Rehnquist
Chief Justice
United States Supreme Court
One First, N.E.
Washington, D.C. 20543

Re: State v. Hagen, No. 92-6281, On Petition for Writ of Certiorari to the Supreme Court of Utah

Dear Mr. Chief Justice:

Pursuant to Supreme Court Rule 36.1, this letter serves as petitioner Robert P. Hagen's written consent to the Ute Indian Tribe filing a brief amicus curiae in the above-captioned action throughout these proceedings, including the period prior to this Court's consideration of the petition for writ of certiorari.

Sincerely,

/s/ Joel Berrett
Joel D. Berrett
Counsel of Record for Petitioner
Post Office Box 262
Roosevelt, Utah 84066
(801) 722-3606

# APPENDIX B

THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

| | | |
|---|---|---|
| UTE INDIAN TRIBE of the Uintah and Ouray Reservation, Utah<br>Plaintiff,<br>vs.<br><br>STATE OF UTAH,<br>Defendant in Intervention,<br>and<br>DUCHESNE COUNTY, a political subdivision of the State of Utah;<br>UINTAH COUNTY, a political subdivision of the State of Utah;<br>ROOSEVELT CITY, a municipal corporation;<br>and DUCHESNE CITY, a municipal corporation,<br>Defendants.<br><br>UNITED STATES OF AMERICA and<br>PARADOX PRODUCTION CORPORATION, a Utah Corporation,<br>Amicus Curiae. | ) | Civil No. C 75-408<br>ORDER |

This matter came before the Court on the Motion of the Ute Indian Tribe for a Temporary Restraining Order or Preliminary Injunction. All parties to the proceeding received copies of the Tribe's pleadings in advance of a hearing held on Monday, August 3, 1992 at 3:30 p.m. and were represented by legal counsel at the hearing.

At the Court's request, attorneys for the Tribe had spoken with the State Attorney General's office prior to the hearing for the purpose of determining whether the parties could reach an agreement on the issue presented to this Court by the Tribe's motion for a preliminary injunction. A stipulation was reached, whereby the State agreed, on behalf of itself and its political subdivisions, to refrain from enforcing the Utah Supreme Court's decision in State v. Perank, No. 860243 (Utah July 17, 1992); from exercising civil or criminal jurisdiction in a manner that conflicts with federal law within the exterior boundaries of the Uintah and Ouray Reservation, as those boundaries were set forth by the Tenth Circuit Court of Appeals in Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986); or from interfering, in any



way, with the Tribe's exercise of criminal, civil and regulatory jurisdiction, consistent with federal and tribal law, within the exterior boundaries of the Uintah and Ouray Reservation, as those boundaries were set forth by the Tenth Circuit Court of Appeals in Ute Indian Tribe, supra.

Counsel for the State and for the Tribe stated, for the record, their respective understandings of the agreement, which had not yet then been memorialized. No objection to the agreement was lodged by counsel for the political subdivisions or amicus curiae United States.

The Court hereby incorporates by reference the attached stipulation between the State of Utah, County of Duchesne, County of Uintah, City of Roosevelt, City of Duchesne and Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, and hereby ORDERS that the parties shall comply with the provisions of said stipulation until this Court issues its decision on the merits of the Tribe's Renewed Motion for Injunctive Relief or until such other date as is fixed by agreement between the parties or by order of this Court.

Dated this 2nd day of September, 1992, nunc pro tunc August 3, 1992.

/s/
Bruce S. Jenkins, Chief Judge
United States District Court
District of Utah



**STIPULATION**

This stipulation is made this 31st day of August, 1992, by and between the State of Utah [hereafter, "the State"], the County of Duchesne, the County of Uinta, the City of Roosevelt, the City of Duchesne [hereafter collectively referred to as "the local defendants"] and the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah [hereafter, "the Tribe"], through the parties' legal counsel.

The Utah Supreme Court's decision in State v. Perank, No. 860243 (July 17, 1992) conflicts with the decision of the Tenth Circuit Court of Appeals in Ute Indian Tribe v. Utah, 773 F.2d (10th Cir. 1985) (en banc), cert. denied, U.S. (1986) insofar as each decision purports to set forth the boundaries of the Uintah Valley Reservation (now a part of the Uintah and Ouray Reservation). In order to avoid potential chaos and avoid jurisdictional uncertainty in the Uintah Basin, the State, local defendants and Tribe enter into the following stipulation.

1. The State, local defendants, their officers, agents, employees and any person acting in their behalf shall refrain from enforcing the Utah

Supreme Court's decision in State v. Perank, No. 8602433 (Utah July 17, 1992), and shall refrain from exercising criminal jurisdiction over Indians who are members of the Ute Indian Tribe or any other federally recognized Indian Tribe or civil jurisdiction over actions involving the Ute Indian Tribe or members of the Ute Indian Tribe, or interfering, in any way, with the Tribe's exercise of such civil or criminal jurisdiction within the exterior boundaries of the Uintah and Ouray Reservation, Utah, as those boundaries were set forth by the Tenth Circuit Court of Appeals in Ute Indian Tribe v. Utah, 773 F.2d 10 (10th Cir. 1985) (en banc), cert. denied, U.S. (1986).

2. The Tribe shall exercise criminal jurisdiction over Indians who are members of the Ute Indian Tribe or any other federally recognized Indian Tribe and shall exercise civil and regulatory jurisdiction over Indians and non-Indians to the extent permitted by federal and tribal law within the exterior boundaries of the Uintah and Ouray Reservation, Utah, as those boundaries were set forth by the Tenth Circuit Court of Appeals in Ute Indian Tribe v. Utah, 773 F.2d 10 (10th Cir. 1985)



(en banc), cert. denied, U.S. (1986).

3. This stipulation shall expire on the date immediately following the date on which the Federal District Court for the District of Utah issues its decision on the Tribe's Renewed Motion for Injunctive Relief in Civil No. C-75-408 unless further extended in writing by the parties or by order of the Federal District Court for the District of Utah.

4. Nothing contained herein shall prejudice or be deemed a waiver of the claims or defenses of any party to this stipulation.

| | |
|---|---|
| /s/<br>Paul Van Dam<br>Attorney General<br>State of Utah | /s/<br>Robert S. Thompson, III<br>General Counsel<br>Ute Indian Tribe |
| /s/<br>Harry Souvall, Attorney<br>Uinta County, Utah | /s/<br>Herbert Gillespie, Attorney<br>Duchesne County, Utah |
| /s/<br>Craig Bunnell, Attorney<br>City of Roosevelt | /s/<br>Paul Uresk, Attorney<br>City of Duchsene |

# APPENDIX C

IN THE SUPREME COURT OF THE STATE OF UTAH

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Regular May Term, 1992 August 4, 1992

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State of Utah,
Plaintiff and Appellee,

No. 860243

v.

Clinton Perank,
Defendant and Appellant

---

MINUTE ENTRY

The Court being fully advised in the premises grants the motion of the State and orders that the issuance of the remittitur be stayed and that the finality of the judgment of the Court also be stayed pending (1) the conclusion of any proceedings on certiorari to the United States Supreme Court and (2) the final disposition of the injunctive proceeding pending in the United States District Court for the District of Utah.

---

By the Court

Joel D. Berrett
Attorney for Defendant
P.O. Box 262
Roosevelt, Utah 84066
(801) 722-3606

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH,<br>Plaintiff-Appellee, | : | ORDER TO STAY REMITTITUR |
| vs. | : | |
| ROBERT P. HAGEN,<br>Defendant-Appellant. | : | |

Based upon the motion of the defendant and good cause, the remittitur is stayed for 90 days pending defendant's decision whether to file a petition for a writ of certiorari in the United States Supreme Court.

DATED this 18th day of Aug., 1992.

FOR THE COURT:

/s/ Gordon R. Hall

Supreme Court, U.S.
FILED
JUL 1 1993
OFFICE OF THE CLERK

No. 92-6281

In The

# Supreme Court of the United States

October Term, 1993

ROBERT P. HAGEN,

*Petitioner,*

vs.

STATE OF UTAH,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Utah**

## JOINT APPENDIX

MARTIN E. SENECA, JR.*
P.O. Box 2904
Reston, VA 22090
(703) 471-5474

DANIEL H. ISREAL
1715 Pearl Street
Suite C
Boulder, CO 80302
(303) 939-8180

*Counsel for Petitioner*

*Counsel of Record

JAN GRAHAM,
Attorney General of Utah

MICHAEL M. QUEALY*
Asst. Attorney General
1636 West North Temple
Suite 300
Salt Lake City, UT 84116
(801) 538-7227

*Counsel for Respondent*

**Petition For Certiorari Filed October 15, 1992**
**Certiorari Granted April 19, 1993**

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## CHRONOLOGICAL LIST OF DOCKET ENTRIES

| *Date* | *Description* |
|---|---|
| 4/19/88 | Information by Jerry Foote (complainant). |
| 4/19/88 | Warrant of arrest. |
| 4/19/88 | Search warrant. |
| 4/19/88 | Affidavit and order for search warrant – Jerry Foote, affiant officer. |
| 4/20/88 | Bail record. |
| 4/21/88 | Minute entry – appearance of counsel for plaintiff. |
| 4/21/88 | Undertaking of bail. |
| 5/2/88 | Inventory of property taken by authority of search warrant. |
| 5/3/88 | Notice of appearance of counsel for defendant. |
| 5/3/88 | Motion for full disclosure and motion and request for evidence favorable to defendant. |
| 7/7/88 | Order to show cause (on motion of the court). |
| 7/28/88 | Minute entry – order to show cause. |
| 3/13/89 | Minute entry – Duchesne county attorney earlier advised court that this matter would be tried in federal court. The federal court declined jurisdiction. Prior order to dismiss the information was revoked. |
| 3/20/89 | Minute entry – defendant in custody and was advised of charges. |

| | |
|---|---|
| 3/23/89 | Minute entry – appearance. Defendant states that his attorney, not present, will make a motion to dismiss these cases. |
| 3/27/89 | Minute entry – request for continuance, property bond to be filed, and order for hearing regarding jurisdiction. |
| 3/30/89 | Order, that the court files be reopened and information reinstated in this court. |
| 4/6/89 | Undertaking of bail and order. |
| 4/17/89 | Notice of setting for preliminary hearing. |
| 5/2/89 | List of exhibits. |
| 5/18/89 | Minute entry – preliminary hearing, court finds probable cause and orders defendant bound over to the 8th District Court. |
| 5/18/89 | Bind over order by 8th Judicial Circuit Court to 8th Judicial District Court. |
| 5/30/89 | Criminal minute entry – arraignment in the 8th Judicial District Court before Judge Dennis L. Draney. |
| 5/31/89 | Minute entry – notice of trial date. |
| 8/28/89 | Criminal minute entry – change of plea and arraignment (8th Judicial District Court). |
| 8/28/89 | Affidavit of defendant in advance of guilty plea, filed 9/5/89. |
| 8/28/89 | Order accepting defendant's guilty plea and entrance of affidavit. |
| 8/28/89 | Plea agreement. |
| 9/25/89 | Criminal minute entry, pronouncement of judgment (ordered 90 day evaluation at Department of Corrections, Utah State Prison). |



| | |
|---|---|
| 9/25/89 | Order for 90 day evaluation by Division of Corrections. |
| 12/18/89 | Criminal minute entry, pronouncement of judgment. |
| 1/4/90 | Defendant's motion to arrest judgment and withdraw guilty plea. |
| 1/4/90 | Defendant's memorandum and points of authorities in support of motion to arrest judgment and withdraw guilty plea. |
| 1/8/90 | Criminal minute entry, pronouncement of judgment. |
| 1/22/90 | Criminal minute entry – evidentiary hearing and pronouncement of judgment. |
| 1/22/90 | Judgment and order denying defendant's motion to arrest judgment and withdraw guilty plea. |
| 1/24/90 | List of exhibits. |
| 2/15/90 | Defendant's notice of appeal. |
| 2/15/90 | Designation of record on appeal. |
| 2/21/90 | Defendant's affidavit of impecuniosity. |
| 2/21/90 | Defendant's affidavit of impecuniosity. |
| 2/23/90 | Motion and order for state to pay costs of transcript. |
| 2/28/90 | Motion and order for state to pay costs of transcript. |
| 3/2/90 | Request for transcript by defendant/ appellant. |

IN THE SEVENTH CIRCUIT COURT OF
THE STATE OF UTAH
DUCHESNE COUNTY, DUCHESNE DEPARTMENT

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| | | |
|---|---|---|
| STATE OF UTAH,<br>Plaintiff,<br>vs.<br>ROBERT P. HAGEN,<br>Defendant.<br>DOB: 09-08-49 | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | INFORMATION<br><br><br><br>Criminal No. _____ |

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The undersigned compiainant, JERRY FOOTE, under oath states on information and belief that the defendant committed the crime of:

(crime) DISTRIBUTION OF A CONTROLLED SUBSTANCE
(classification) THIRD DEGREE FELONY

at: County of Duchesne, State of Utah
on: April ~~14~~ [18], 1988

in violation of: Section 58-37-8 UCA (1953) as amended

The acts of the defendant constituting the crime were: That at the time and place aforesaid, the defendant did distribute a controlled substance, to-wit: marihuana, and/or defendant did possess said controlled substance with intent to distribute the same.



This information is based on evidence obtained from the following witnesses:

/s/ Gerry E. Foote
COMPLAINANT

SUBSCRIBED and SWORN to before me this 19 day of April, 1988.

/s/ A. L. [illegible]
JUDGE

/s/ Herbert Wm. Gillespie
DUCHESNE COUNTY
ATTORNEY

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JUDICIAL CIRCUIT COURT
STATE OF UTAH
DUCHESNE COUNTY, DUCHESNE DEPARTMENT

| | | |
|---|---|---|
| STATE OF UTAH | * | BIND OVER ORDER |
| PLAINTIFF | * | CASE NO 89-CR-41-D |
| VS | * | |
| Robert R. Hagen | * | |
| DEFENDANT | * | |

INFORMATION FILED ON April 25, 1988

FIRST APPEARANCE HEARING HELD ON _____

PRELIMINARY EXAMINATION HELD ON May 18, 1989

Appearing for State of Utah

Herbert Wm. Gillespie

Appearing for Defendant

Kirk C. Bennett

CRIME CHARGED Possession of a Controlled Substance

The COURT, having considered the matter and being fully advised in the premises, NOW, THEREFORE, rules that:

From the evidence presented at the preliminary examination, the COURT finds that there is sufficient cause to believe that the defendant committed the crime charged. It is ORDERED that the defendant be bound



over to answer said charge in the ~~Seventh~~ EIGHTH Judicial District Court for further proceedings.

Arraignment in the ~~Seventh~~ Eighth District Court will be held on the 30th day of May, 1989, at 10 a.m.

DATE: 5-18-89

/S/ A. L. [illegible]
Circuit Judge

This order and all pleadings in and records made of the proceedings in this case (except tapes No. 89-19, 20, which have been retained subject to the order of the District Court) transmitted to the Clerk of the District Court on 25th day of May, 1989 by the undersigned.

/s/ Annabelle Toney
Deputy Clerk

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF DUCHESNE COUNTY

STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH,<br>Plaintiff,<br>vs.<br>ROBERT PALMER HAGEN,<br>Defendant. | : | MOTION TO ARREST JUDGMENT AND WITHDRAW GUILTY PLEA<br><br>Case No. 89 CR 41D |

Defendant, by and through counsel, Harry H. Souvall, of McRae & DeLand, hereby moves the Court for an Order arresting judgment on the grounds of lack of jurisdiction. This Motion is brought pursuant to Rule 23, Utah Rules of Criminal Procedure and is supported by the Memorandum of Points and Authorities filed concurrently herewith.

DATED 4th day of January, 1990.

McRAE & DeLAND

/s/ Harry Souvall
HARRY H. SOUVALL
Attorney for Defendant



THE EIGHTH JUDICIAL DISTRICT COURT
in and for Duchesne County
of the State of Utah

| | |
|---|---|
| STATE OF UTAH<br>VS.<br>ROBERT P. HAGEN | CRIMINAL MINUTE ENTRY<br>NO. 89-CR-41-D<br>DATE: JANUARY 22, 1989<br>JUDGE: DENNIS L. DRANEY<br>COURT REPORTER: MILO HARMON |

**********

CRIME: DISTRIBUTION OF A CONTROLLED SUBSTANCE THIRD DEGREE FELONY

COUNSEL FOR PLAINTIFF: HERBERT WM. GILLESPIE
COUNSEL FOR DEFENDANT: HARRY H. SOUVAL

PROCEEDINGS BEFORE THE COURT: EVIDENTIARY HEARING AND PRONOUNCEMENT OF JUDGMENT

Defendant was sworn and testified on direct. Defendants exhibits No. 1 (BIA Individual Indian Monies, Statement of Account), No. 2 (case law), No. 3 (copy of enrollment card) and #4 (letter re Little Shell Tribe Status) were offered and received. Witness continued testifying on cross, re-direct and re-cross examination. Defendants exhibit # 6 (Petition for Declaratory Relief and Jurisdiction) was offered and received. Plaintiffs exhibit # 5 (Opinion) was offered and received by the Court. Counsel

argued the matter. In this matter the Court having heard the motions to Arrest Judgment and Guilty Plea, the court finds that the defendant is not a member of any Federally recognized tribe and thereby denies the motion.

There being no reason why judgment should not be pronounced, it was the judgment of the Court that the defendant be confined at the Utah State Prison for a term of zero (0) to five (5) years. Defendant to pay a fine of $600.00 and $150.00 surcharge, plus a drug fee of $150.00 and $60.00 restitution. Defendant was remanded to the custody of the Duchesne County Sheriff for transportation to that facility.

Defense counsel requested a stay on the sentence during appeal time. Court denied the motion.

MAXINE B. PANAS - COURT CLERK.

COPY TO:

Herbert Wm. Gillespie
Harry H. Souvall

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF
THE STATE OF UTAH
IN AND FOR DUCHESNE COUNTY

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| | | |
|---|---|---|
| STATE OF UTAH, | : | JUDGMENT AND |
| Plaintiff, | : | ORDER |
| | : | |
| vs. | : | Criminal No. 89- |
| ROBERT P. HAGEN, | : | CR-41-D |
| | : | |
| Defendant. | : | |
| | : | |

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This matter came on for sentencing on the 22nd day of January, 1990, before the Honorable Dennis L. Draney, The plaintiff was represented by Herbert Wm. Gillespie, Duchesne County Attorney. The defendant was present and represented by his attorney, Harry H. Souvall. The Court heard statements from counsel for the parties and defendant, and indicated that he had read the report of State Corrections. Based upon these statements and the record before the Court:

IT IS ADJUDGED in 89-CR-41D, the defendant has been convicted as charged in the Information, of the crime of DISTRIBUTION OF CONTROLLED SUBSTANCE, a Third Degree Felony, Court having asked if the defendant has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ORDERED that in 89-CR-41D the defendant be confined and imprisoned at the Utah State Prison for a term of not more than five (5) years. That he pay a fine of $600.00 with a surcharge of $150.00, in addition to the fine a drug fee of $150.00 and restitution of $60.00 to the Uintah Basin Strike Force.

Defendant is remanded to the custody of the Sheriff of Duchesne County, State of Utah, or his designee, to transport defendant, Robert P. Hagen, to the Utah State Prison, where said defendant shall then and there be confined and imprisoned.

DATED this 22nd day of January, 1990.

BY ORDER OF THE COURT:

/s/ Dennis L. Draney
DENNIS L. DRANEY
District Court Judge

(Certificate Of Mailing Omitted In Printing)

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IN THE EIGHTH JUDICIAL DISTRICT COURT
OF DUCHESNE COUNTY STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH, Plaintiff, | : | NOTICE OF APPEAL |
| vs. | : | Case No. 89-CR-41D |
| ROBERT P. HAGEN, Defendant. | : | |

Notice is hereby given that defendant, Robert P. Hagen, defendant in the above entitled action, hereby appeals to the Supreme Court of the State of Utah, from the Judgment and Order of the above entitled Court rendered by the Honorable Dennis L. Draney, Judge in and for the District Court for the County of Duchesne, State of Utah, which was signed on January 22, 1990.

DATED this 15th day of February, 1990.

McRAE & DeLAND

/s/ Harry H. Souvall
HARRY H. SOUVALL
Attorney for Defendant

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IN THE SUPREME COURT OF THE STATE OF UTAH

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April 23, 1991

The State of Utah,
Plaintiff and Petitioner
v.
No. 910017
Robert P. Hagen,
Defendant and Respondent.

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Petition for Writ of Certiorari having been considered, and the Court being sufficiently advised in the premises, it is ordered that a petition for Writ of Certiorari be, and the same is, granted as prayed.

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In the SUPREME COURT of the STATE OF UTAH

State of Utah,
Plaintiff and Petitioner,
v.
Robert Hagen,
Defendant and Respondent.

No. 910017

FILED
July 17, 1992

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Eighth District, Duchesne County
The Honorable Dennis L. Draney

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On Certiorari to the Utah Court of Appeals

DURHAM, Justice:

Defendant Robert Hagen pleaded guilty in Eighth District Court to distributing a controlled substance, a third degree felony under Utah Code Ann. § 58-37-8(1)(b)(ii) (Supp. 1991). The plea affidavit stated that defendant sold marijuana from his residence in Myton, Duchesne County, Utah. Prior to sentencing, defendant moved to arrest judgment and to withdraw his guilty plea. In his motion, he challenged the court's jurisdiction on the basis that he was an Indian and his alleged crime occurred in Indian country, the Uintah-Ouray Reservation, and was thus not subject to state court jurisdiction. Federal law provides for exclusive federal jurisdiction over a defendant who is an American Indian and who commits a criminal offense in Indian country.[1]

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[1] There are certain exceptions to this general grant of jurisdiction. These exceptions, however, are not relevant to the disposition of this case.

18 U.S.C. §§ 1152, 1153 (1988). The court denied the motion. Defendant subsequently appealed the conviction to the Utah Court of Appeals. The court of appeals reversed defendant's conviction, holding that a 1985 Tenth Circuit decision had conclusively determined that Myton was in Indian country and holding that the State had failed to meet its burden of disproving defendant's personal Indian status. We issued a writ of certiorari to review the decision of the court of appeals.

We conclude that the court of appeals erred in treating Myton as Indian country. This court's opinion today in *State v. Perank*, No. 860254, slip op.(Utah July 17, 1992), establishes that for purposes of criminal jurisdiction, Myton, Utah, is not in Indian country. *See id.* at 9 n.10;*id.* at 41. In *Perank*, we held that 1902 and 1905 congressional acts diminished the original Uintah Indian Reservation boundaries and that subsequent homesteading and settlement therefore occurred on lands restored to the public domain. *See id.* at 8, 19-29. We concluded that Myton, Utah, where defendant's alleged criminal conduct occurred, is therefore not in Indian country. *See id.* at 41. Thus, in the instant case defendant's criminal conduct in Myton may form the basis of state court jurisdiction, regardless of defendant's personal Indian status. We therefore reverse the decision of the court of appeals and reinstate defendant's conviction.

Reversed.

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WE CONCUR:

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Gordon R. Hall, Chief Justice

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Richard C. Howe, Associate
Chief Justice

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I. Daniel Stewart, Justice

Zimmerman, Justice, dissents.

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In the SUPREME COURT of the STATE OF UTAH

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State of Utah,
Plaintiff and Appellee,

v.

Clinton Perank,
Defendant and Appellant.

No. 860243
FILED
July 17, 1992

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Seventh District, Duchesne County
The Honorable Richard C. Davidson

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*STEWART, Justice:*

Clinton Perank was convicted in a state court of committing a burglary in Myton, Utah, in violation of Utah Code Ann. § 76-6-202 (1978), and placed on probation. The court thereafter revoked his probation and ordered him committed to the Utah State Prison for a term of 0-5 years. Perank appealed from the revocation of probation, and we stayed execution of the sentence pending appeal.[1]

Perank argues that the state trial court lacked jurisdiction to convict him of burglary and that the Ute Tribal Court had exclusive jurisdiction because he is an Indian and the offense occurred within Indian country. Two issues are presented: (1) whether Perank is an Indian and

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[1] Appellate jurisdiction of this case would ordinarily lie with the Utah Court of Appeals. *See* Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1988). Because of the importance of the question presented, the Court of Appeals certified the case to this Court.



(2) whether the Uintah-Ouray Indian Reservation was diminished by an act of Congress, leaving Myton, Utah, outside the jurisdictional boundaries of that Reservation.

Even though Perank pleaded guilty to the burglary charge and did not raise the issue of lack of subject matter jurisdiction with respect to the burglary until the probation revocation proceeding, the issue is properly before this Court. A plea of guilty does not waive a claim that the court lacks power to adjudicate a charge against the defendant. *Blackledge v. Perry*, 417 U.S. 21,30-31 (1974); *see also* 1 Charles A. Wright, *Federal Practice and Procedure* § 175, at 623-33 (1982). Also, the issue of subject matter jurisdiction can be raised at any time. *See Glasmann v. Second District Court*, 80 Utah 1,7,12 P.2d 361, 363 (1932).

This Court invited the United States Department of Justice to file an amicus curiae brief in this case because of the importance of the issue of the location of the boundaries of the Uintah-Ouray Indian Reservation (sometimes hereinafter "Uintah Reservation") and because the Department had filed an amicus brief in opposition to the State of Utah's petition for ceriorari to the United States Supreme Court from a decision of the United States Court of Appeals for the Tenth Circuit which held that the Uintah Reservation had not been diminished under a series of congressional acts from 1902 to 1905. *See Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986). The Department of Justice submitted to this Court a copy of the amicus brief it filed for the United States opposing the State's petition for certiorari in *Ute Indian Tribe*. In that brief, the Department stated, inter alia, that the issues presented in the petition for a writ of certiorari did

not require review by the Supreme Court at that time because they could by addressed in a later case if the Utah Supreme Court were to disagree with the Tenth Circuit.[2]

The Ute Indian Tribe, also at our invitation, filed an amicus brief, but addressed only the issue of whether Perank is an Indian within the meaning of 18 U.S.C. § 1152. We note that neither Perank, the Department of Justice, nor the Tribe suggests that the Tenth Circuit's *en banc* decision in *Ute Indian Tribe* has res judicata effect in this case.[3]

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[2] The Department of Justice in its amicus brief failed to recognize that the Tenth Circuit's *en banc* decision in *Ute Indian Tribe* was in conflict with prior decisions of this Court. *See Sowards v. Meagher*, 37 Utah 212, 108 P. 1112 (1910); *White Rocks Irrigation Co. v. Mooseman*, 45 Utah 79, 141 P.459 (1914). The Department referred only to *Brough v. Appawara*, 553 P.2d 934 (Utah 1976), which was vacated and remanded for further consideration. *Brough v. Appawara*, 431 U.S. 901 (1977). No further opinion was rendered by this Court in *Brough*. The Department's brief stated, "If the Utah Supreme Court nevertheless should adhere to its prior view in some future case, notwithstanding the intervening decision in *Solem* and the exhaustive consideration of the issue by the courts below, there will be time enough for this Court to grant review." Brief for the United States in opposition as Amicus Curiae, *Utah v. Ute Indian Tribe*, on petition for writ of certiorari to United States Court of Appeals for the Tenth Circuit, No. 85-1821, October Term 1986, at 14-15.

[3] Res judicata is an affirmative defense in both criminal and civil cases and therefore is waivable. *See* Utah R. Civ. P. 8(c), 12 (h); *Rothey v. Walker Bank Trust Co.*,754 P.2d 1222, 1225 (Utah 1988); *Manger v. Davis*, 619 P.2d 687, 692 (Utah 1980); *Jackson v. Rich*, 499 P.2d 279, 280 (Utah 1972); *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959); *Louisville v. Nashville R.R. v. M/V Bayou*



## I. PERANK'S INDIAN STATUS

State criminal jurisdiction does not extend to Indians who commit crimes in Indian country. *See* 18 U.S.C.

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*Lacombe*, 579 F.2d 496, 471 n.1 (5th Cir. 1979);*Parks v. Pavkovic*, 752 F.2d 1397, 1404 (7th Cir. 1985); *State v. Hall*, 383 P.2d 602, 611-12 (Idaho 1963). Even if the defense had been raised in this case, its application against the State of Utah would be problematic. Although we have held that collateral estoppel does not require mutuality of parties when used defensively against private litigants, *see Robertson v. Campbell*, 674 P.2d 1226, 1230 (Utah 1983); *Searle Brothers v. Searle*, 588 P.2d 689, 690-91 (Utah 1978), we have not decided whether the doctrine of nonmutual collateral estoppel applies against the State. Federal law generally requires full mutuality of parties when collateral estoppel is applied against the government. *See United States v. Mendoza*, 464 U.S. 154 (1984); *See also United States v. Stauffer Chemical Co.*, 464 U.S. 165, 169 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980); *Montana v. United States*, 440 U.S. 147, 155-62 (1979); *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948). Nonmutual collateral estoppel does not apply against the government because of overriding policy considerations. *Mendoza*, 464 U.S. at 163-64. The rule requiring full mutuality of parties has also been required with respect to estopping state governments. *See Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558, 1577-82 (11th Cir. 1985). *See generally* Restatement (Second) of Judgments § 28 (1982); 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4425 (1981 & Supp. 1992). As the Utah cases cited in footnote 2 indicate, the issue of reservation diminishment can arise in a number of civil contexts in which the State of Utah is not a party, and rather than delay a decision on an issue of such substantial public importance that will inevitably recur, we think it appropriate to address the diminishment question, even if res judicata were otherwise applicable against the State.

§§ 1152, 1153 (1982 & Supp. 1991).[4] Federal Statutes, however, do not define the term "Indian" for jurisdictional purposes. Although the State concedes that Perank is an Indian, the Tribe, as amicus, argues that he is not. Ordinarily, an amicus may only present arguments pertaining to issues properly raised by the parties before the court. However, because this issue goes to subject matter jurisdiction, we will address it.

The Tribe argues that Perank is not an Indian under the jurisdictional statute because he was not officially enrolled as a member of the Tribe at the time of the burglary. We disagree and hold that Perank was an Indian at the time of the crime for purposes of 18 U.S.C. §§ 1152, 1153.[5]

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[4] A complex set of rules governs criminal jurisdiction in Indian country. *See generally* Felix S. Cohen, Handbook of Federal Indian Law 34-38, 286-304, 335-41 (1982); Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503 (1976); Scott W. Wilson, *Criminal Jurisdiction in Montana Indian Country*, 47 Mont. L. Rev. 513 (1986); Paul S. Volk, Note, *The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction Over Crimes By and Against Reservation Indians*, 20 New Eng. L. Rev. 247 (1984-85); K. Bliss Adams, Note, *Order in the Courts: Resolution of Tribal/State Criminal Jurisdictional Disputes*, 24 Tulsa L.J.89 (1988).

[5] Section 1152 of the United States Code provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any



*United States v. Rogers*, 45 U.S. (4 How.) 567, 572-73 (1846), set forth two factors to be evaluated in determining who is an Indian. A person is an Indian who (1) has a significant degree of Indian blood and (2) is recognized as an Indian by a tribe or society of Indians or by the federal government. *See United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977); *St. Cloud v. United States*, 702 F.Supp. 1456, 1460 (D.S.D. 1988); *State*

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> case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Section 1153 of the Code provides:

> Any Indian who commits against the person or property of another Indian or another person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.
>
> In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

*v. LaPier*, 790 P.2d 983, 986 (Mont. 1990); *State v. Attebery*, 519 P.2d 53, 54 (Ariz. 1974); *see also Ex parte Pero*, 99 F.2d 28, 30-32 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939); Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L.Rev. 503, 515-16 (1976).[6]

We turn to the first factor, whether Perank has a significant degree of Indian blood. As the son of a full-blood Ute father and a mixed-blood mother, Perank has more than one-half Indian blood and at least one-half Ute blood, which is sufficient to satisfy the first requirement under *Rogers*. Persons with less than one-half Indian blood have been held to have a significant degree of Indian blood. *See, e.g., St. Cloud*, 702 F.Supp. at 1460-61

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[6] While federal crime statutes do not define the term "Indian," 25 U.S.C. § 479 (1983) defines Indian for the purposes of land ownership and allotment:

> The term "Indian" as used in [various sections of Subchapter V – Protection of Indians and Conservation of Resources] shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

Perank would be considered an Indian under this provision because he has one-half or more Indian blood. The definition of the term "Indian" may vary, however, depending on the context for which Indian identity is relevant. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 19-20 (1982).



(holding 15/32 Yankton Sioux blood sufficient to establish the first *Rogers* requirement and citing four cases which held less than 1/2 Indian blood to be sufficient); *Makah Indian Tribe v. Clallam County*, 440 P.2d 442, 444 (Wash. 1968) (1/4 Indian blood sufficient).

Perank has also been recognized as an Indian by both the Tribe and the federal government. Although Perank was not formally enrolled in the Ute Tribe at the time of his conviction, lack of enrollment does not determine Indian status for purposes of jurisdiction. *See Ex parte Pero*, 99 F.2d at 31; *St. Cloud*, 702 F.Supp. at 1461; *LaPier*, 790 P.2d at 987. Nevertheless, the Tribe formally recognized Perank as an Indian and as a member of the Tribe by his enrollment in the Tribe at a later date. Moreover, under the terms of the Ute Indian Tribe Constitution, it appears that Perank was a member of the Ute Tribe at the time of the offense. Article II, section 1(b) of the Constitution provided that a child born to a member of the Tribe living on the Reservation at the time of the birth is entitled to membership. That provision states:

> Section 1. The membership of the Ute Indian Tribe of the Uintah and Ouray Reservation shall consist as follows:
>
> . . . .
>
> (b) All childern born to any member of the Ute Indian Tribe of the Uintah and Ouray Reservation who is a resident of the Reservation at the time of the birth of said children.

Ute Indian Tribe of the Uintah and Ouray Reservation Const. art. II, § 1.[7] Perank's father was an enrolled member of the Tribe and resided on the Reservation when Perank was born.[8] In *Chapoose v. Uintah And Ouray Tribal Business Committee*, Civ.No. 133-77, slip op. at 16-19 (Ute Tribal App. Ct. Jan. 22, 1981), the Ute Tribal appellate court held that Tribe membership was an automatic right for those who qualified under article II, section 1 of the Ute Constitution. Enrollment merely formalized the right.

In addition, according to an affidavit filed by Perank in the trial court, he has lived as an Indian by maintaining social, political, and spiritual relations as an Indian, including participation in Indian rituals. In his brief, he states that he "has lived his life as an Indian, and has been treated as an Indian by governmental entities." Also, in January 1986, Perank was convicted of three offenses in the Ute Tribal Court.

On these facts, we conclude that Perank carried his burden of factually establishing that he has been "recognized racially" as a Ute Indian. Accordingly, we hold that Perank is an Indian for the purpose of determining jurisdiction under 18 U.S.C.§§ 1152 and 1153.

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[7] We take judicial notice of the Tribal Constitution pursuant to Rule 20(b) of the Utah Rules of Evidence. This provision of the Constitution was amended in 1988.

[8] These facts are taken from affidavits of Perank's parents submitted in the revocation proceeding.



## II. THE BOUNDARIES OF THE UINTAH-OURAY RESERVATION

The next issue is whether Myton, Utah, the site of the burglary, lies within Indian country, i.e., within the boundaries of the Uintah-Ouray Reservation. If so, the district court lacked jurisdiction over the crime under 18 U.S.C. § 1152.[9] There are two contentions: First, that Myton is not within the Uintah-Ouray Reservation because the Reservation was diminished by a 1902 congressional Act as amended and supplemented by subsequent Indian Appropriation Acts in 1903, 1904, and 1905, and second, that the 1905 Act opened the Reservation without regard to the 1902 Act and that the language of the 1905 Act left the boundaries of the Reservation intact.

Resolution of the diminishment issue turns on two issues. The first is whether the language of the Act of May 27, 1902, which provided that the unallotted lands were to be "restored to public domain," if used as operative statutory language opening a reservation would effect a diminishment of that reservation as to the lands so restored. The second issue is whether, as a matter of statutory construction, the operative language in the 1902 Act, "restored to the public domain," remained in effect as operative statutory language when the Reservation was finally opened in 1905.

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[9] 18 U.S.C. § 1152 precludes the exercise of state jurisdiction over crimes committed by Indians in Indian country, and section 1151 defines Indian country to include all land within a reservation. *See supra* note 5.

We hold that the retoration language in the 1902 Act established the necessary congressional intent to diminish the Reservation as to those lands restored to the public domain and that the restoration language in 1902 Act remained operative statutory language when the Reservation was opened in 1905.

For clarity, we observe that all parties agree that the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use. These lands are collectively referred to as "trust lands." Furthermore, it is an undisputed fact that approximately 1,010,000 Reservation acres were withdrawn and attached to what are now the Ashley and Uintah National Forests by presidential proclamation, pursuant to the 1905 Act. The legal status of these lands is not at issue here, nor is the legal statue of the Uncompahgre Reservation, a neighboring reservation in eastern Utah. In 1948, Congress added to the Reservation 510,000 acres known as the Hill Creek Extension. Act of March 11, 1948, 62 Stat. 72. The status of that land is likewise not at issue. We note that the *en banc* decision in *Ute Indian Tribe* held that the land added to the Uintah National Forest remained in the Reservation and that the Uncompahgre Reservation was not disestablished. 773 F.2d 1089-90; *id.* at 1099-1101 (Seymour, J., concurring). The only issue in this case, therefore, is whether the unallotted and unreserved lands that were opened to entry in 1905 and not later restored to tribal ownership and jurisdiction by the 1945 "Order of Restoration" are within the present boundaries of the Reservation.[10]

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[10] In 1902, the Uintah Reservation contained approximately 2,039,040 acres. The federal government in 1905 withdrew



A. Congressional Intent to Diminish

In 1887, Congress initiated a significant change in policy toward the Indians. The new policy was designed to integrate the Indians into white, agrarian society and ultimately to do away with the reservation system. The

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1,010,000 acres as an addition to the Uintah National Forest. The allotments to individual Indians under the 1902 Act and the lands reserved for grazing and other purposes set aside for the Tribe by a 1902 Joint Resolution and the 1903 and 1905 Acts make up approximately 360,000 acres. An executive "Order of Restoration" under the authority of the Act of June 18, 1934, 48 Stat. 984, restored to the Tribe in 1945 both the title and tribal jurisdiction to over 217,000 acres that had been previously opened and restored to the public domain in 1905. This Order is discussed later in the text. In 1948, Congress added to the Uintah Reservation the Hill Creek Extension, which contained approximately 510,000 acres of the former Uncompahgre Reservation. At present, the Uintah Reservation, including the trust lands, the lands restored to the tribal jurisdiction by the Order of Restoration, and the lands added to the Reservation by the Hill Creek Extension, total approximately 1,087,000 acres. If the 1,010,000 acres of Reservation land that were set apart as an addition to the Uintah Forest Reserve but held to be part of the Reservation in *Ute Indian Tribe* are added to the 1,087,000 acres, the Reservation today is larger than it was in 1902, before the restoration of the unallotted lands to the public domain.

There are approximately 1,500 enrolled members of the Ute Tribe. *Ute Indian Tribe*, 773 F.2d at 1105 (Seth, J., dissenting). The tribal seat of government is located at Fort Duchesne, Utah, which is located on trust lands. Most of the lands opened for settlement under the 1905 Act were in Duchesne County. Some 18,000 non-Indians now live the area that the State asserts was disestablished, and only about 300 Indians, not all of whom are members of the Ute Tribe, live in that same area. The two towns where the bulk of the non-Indian population reside, Roosevelt and Duchesne, are in the disputed area that the State contends is not subject to the tribal jurisdiction. Myton is also in that area.

General Allotment Act of 1887, ch. 119, 24 Stat. 388, authorized the President to allot parcels of reservation lands to Indians and, with tribal consent, to sell the unallotted, or surplus, reservation lands to non-Indians. Thereafter, Congress from time to time enacted special legislation to ensure that a particular reservation was in fact opened to allotment. *Mattz v. Arnett*, 412 U.W. 481, 497 (1973).

Questions subsequently arose regarding whether Congress in opening an Indian reservation, or a portion of it, to entry and settlement by non-Indians intended to leave the reservation boundaries intact so that the land opened to settlement remained within the boundaries of the reservation or whether the opening was also intended to diminish the reservation boundaries, thereby placing the opened land outside the reservation. In *Solem v. Bartlett*, 465 U.S. 463, 468 (1984), the Court explained why Congress in enacting the surplus land acts around the turn of the century often did not make its intent with respect to diminishment explicit:

> Unfortunately, the surplus land Acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When the surplus land Acts were passed, the distinction seemed unimportant. The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by



> non-Indians. Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries. *See* Act of June 25, 1948, ch. 645, § 1151, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (1982 ed.) . . . ).

Another reason why Congress did not concern itself with the effect of surplus land Acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, Members of Congress voting on the surplus land Acts believed to a man that within a short time – within a generation at most – the Indian tribes would enter traditional American society and the reservation system would cease to exist. Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation.

As a consequence, each surplus land act must be examined to determine whether Congress intended to reduce the reservation's boundaries because each act employed its own statutory language, "the product of a unique set of tribal negotiation and legislative compromise." *Solem*, 465 U.S. at 467. Accordingly, the effect of a given surplus land act depends on the language of the act and the circumstances underlying its passage. *Id.* at 469.

The most probative evidence of whether Congress intended to diminish a reservation is the language used in the statutory scheme opening the reservation. *Solem*, 465 U.S. at 470. In addition to the intent derived from the face of the act, the surrounding circumstances and the

legislative history are to be examined in determining congressional intent. *Rosebud Sioux Tribe v. Kneip*, 430 U.S., 584, 587 (1977) (citing *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)). Subsequent treatment of the opened lands by Congress, federal agencies, and local authorities, *Solem*, 465 U.S. at 471, and subsequent jurisdictional history of the opened lands, *Rosebud*, 430 U.S. at 603-05; *DeCoteau v. District County Court*, 420 U.S. 425, 442-44 (1975), may also be useful in resolving the issue of congressional intent to diminish. Congress, however, must have clearly evinced an intent to change the boundaries before diminishment will be found. *Solem*, 465 U.S. at 470. And although doubtful language should be construed in favor of the Indians and against diminishment, this rule of construction does not dictate a determination that reservation boundaries were not diminished when there is a clear intent to the contrary. *See Rosebud*, 430 U.S. at 587.

A variety of operative statutory phrases have been held to effect diminishment. *See Rosebud*, 430 U.S. at 683-84 (Marshall, J., dissenting);[11] *Russ v. Wilkins*, 624 F.2d 914, 921-22 (9th Cir. 1980); *United States v. Parkinson*, 525

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[11] In his dissent in *Rosebud*, Justice Marshall cited four specific examples of clear language of express termination: (1) " 'the Smith River reservation is hereby discontinued' "; (2) " 'a portion of the Colville Indian Reservation . . . is hereby, vacated and restored to the public domain' "; (3) " 'the reservation lines at the said Ponca and Otoe and Missouria Indian Reservation . . . are hereby abolished' "; and (4) part of the Great Sioux Reservation was " 'restored to the public domain.' " *Rosebud*, 430 U.S. at 618 (Marshall, J., dissenting). In addition, Justice Marshall noted that an Indian library compilation contained eleven additional examples of express termination language taken from statutes enacted between 1888-1913. *Id.* at 618 n.3.



F.2d 120, 122-24 (8th Cir. 1975), *cert. denied*, 430 U.S. 982 (1977). No specific talismanic statutory language is required to conclude that Congress intended to diminish a reservation. *See Solem*, 470 U.S. at 471, and it is not necessary that statutory language expressly sever tribal jurisdiction to effectuate a diminishment. *See Rosebud*, 430 U.S. at 586-605; *see also Solem*, 465 U.S. at 469 n.10. Also, a congressional scheme to diminish need not provide for unconditional compensation or a fixed sum to be paid to the Indians for land to be detached from the reservation. *Solem*, 465 U.S. at 471; *Rosebud*, 430 U.S. at 596 n.18. Nor must a scheme to diminish provide for Indian consent. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Solem*, 465 U.S. at 470 n.11; *Rosebud*, 430 U.S. at 587.

Statutory language that merely provides for allotments to be made to the Indians and "opens" the remaining reservation lands to settlement by non-Indians does not demonstrate a congressional intent to diminish the boundaries of a reservation. *Rosebud*, 430 U.S. at 586-87; *Mattz v. Arnett*, 412 U.S. 481, 497 (1973); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 355-58 (1962).

Cession-type language has, however, been held in several cases to establish the requisite intent to diminish. In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the statute at issue ratified an agreement between the United States and the Sisseton and Wahpeton bands of Sioux Indians whereby the Indians agreed to " 'cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in' " the unallotted lands of the Reservation. The Court held that this language was

precisely suited to termination of the Reservation boundaries. *Id.* at 445. Similarly, in *Rosebud*, the Court held that cession-type language in 1904 Act pertaining to a part of the Sioux Reservation manifested a congressional intent to disestablish, even though the cession language was technically misused in that it implied a bilateral agreement and Congress had acted unilaterally in diminishing the Reservation. *Rosebud*, 430 U.S. at 587-88.

Statutory language that opens reservation lands to public entry and "restores" those lands to the "public domain" has also been recognized in a number of Supreme Court cases to effectuate a diminishment of reservation boundaries as to such lands. In *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 354 (1962), the Court stated that an 1892 Act that "vacated and restored to the public domain" the north half of the Colville Indian Reservation diminished the boundaries as to that part of the Reservation.[12] By contrast, the 1906 Act directly at issue in *Seymour* merely opened the south half of the Reservation to public entry. Because the 1906 Act contained no language restoring the land to the public domain, there was no diminishment as to the south half. Thus, the premise of the opinion in *Seymour* was that restoration of reservation land to the public domain constitutes a diminishment.

In *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), the issue was whether the United States had to pay the Indians compensation for lands that had been

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[12] Act of July 1, 1892, ch. 140, 27 Stat. 62, 63.



added to the Sioux Reservation for Indian use by executive order and later detached from the Reservation and "restored to the public domain," by executive order. An implicit assumption of the opinion is that the land restored to the public domain was no longer subject to tribal jurisdiction and had been detached from the Reservation.

In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), the Court recognized in dicta that the Act of March 2, 1889, 25 Stat. 896, which "restored to the public domain" a portion of the lands of the Great Sioux Reservation, terminated the Reservation as to those lands. 430 U.S. at 589 & n.5. Even Justice Marshall, who argued in a dissent that the Act at issue in *Rosebud* lacked an express indication of congressional intent to diminish, recognized that the language of the Act of March 2, 1889, disestablished the Reservation. He stated, "The very Act that created the Rosebud Reservation provides yet another example [of language effecting a diminishment], for in that Act Congress expressly 'restored to the public domain' part of the Great Sioux Reservation. Act of Mar. 2, 1889, § 21, 25 Stat. 896." *Id.* at 618 (Marshall, J., dissenting).

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Court held that the Lake Traverse Reservation in South Dakota was diminished on the basis of cession-type language, but stated the issue to be whether the Reservation "was terminated and returned to the public domain by the Act of March 3, 1891, c.543, 26 Stat. 1035." In other words, land that was "returned to the public domain" was considered no longer subject to tribal jurisdiction. Indeed, the Court referred to the 1892 Act in *Seymour*, which, as noted above, disestablished the north

half of the Colville Reservation by vacating and restoring it "to the public domain," and compared it with the 1906 Act in *Seymour* that merely "opened" the south half of the Reservation, but did not disestablish it, and concluded that the 1891 Act at issue was analogous to the 1892 Act in *Seymour*. 420 U.S. at 448-49.

The Supreme Court's latest discussion of "public domain" language is found in *Solem v. Bartlett*, 465 U.S. 463 (1984). The Court acknowledged that in the act at issue a reference to the opened areas as being in "the public domain" gave support to the argument for diminishment. The public domain language in *Solem* was located in an isolated section of the Act, was used only in a descriptive manner, and did not purport to restore any land to the public domain.[13] Because that phrase was not an operative provision of the Act, the Court concluded

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[13] The Act in question, the Cheyenne River Act, contained nine sections and spanned three and one-half pages in the statutes at large. Act of May 29, 1908, ch. 218, 35 Stat. 460-64. The operative language of the Act was found in the first sentence of the first section. 35 Stat. 460; *Solem*, 464 U.S. at 472-73. The reference to "public domain" was found in the second proviso of the ninth section, or the last sentence of the Act. It was couched in the context of the Indians' right to use timber on particular sections of the lands to be opened:

> *Provided*, That Indians residing upon their allotments in townships sixteen north of ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one east shall have the right to use timber in said townships, except on sections sixteen and thirty-six for domestic purposes only as long as the lands remain part of the public domain.

35 Stat. 464. Unlike the instant case, this reference to public domain was clearly not the operative language of the Act.



that it did not indicate congressional intent to diminish. *Solem*, 465 U.S. 474-75.

We have encountered only one case that stands contrary to these Supreme Court decisions on the effect of restoration language. *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986), held that neither the Uintah-Ouray Reservation nor the adjacent Uncompahgre Reservation had been disestablished or diminished. The majority addressed the effect of restoration language, however, only with respect to the Uncompahgre Reservation. The court, relying on a construction of *Solem* later rejected by a panel of the Tenth Circuit, concluded that "the phrase 'restore to the public domain' is not the same as a congressional state of mind to disestablish. In other words, it doesn't disturb the ownership of the land by the tribal group." 773 F.2d at 1092. In reaching this conclusion, the lead opinion wholly ignored the teachings of *Seymour*, *Sioux Tribe*, *Rosebud*, *DeCoteau*, and the authorities cited in Justice Marshall's dissent in *Rosebud*. With respect to the Uintah Reservation, *Ute Indian Tribe* held that the terms of the 1905 Act alone governed the status of that Reservation and that the 1905 Act, which had no restoration language, did not diminish the Reservation. 773 F.2d at 1089; *id.* at 1093 (Seymour, J., concurring). The court stated that the 1902 and intervening Acts did not reveal a " 'baseline purpose of disestablishment' that carried through into the 1905 Act." 773 F.2d at 1089.

After the decision in *Ute Indian Tribe* was rendered, a panel of the Tenth Circuit in *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1397-1404 (10th Cir.), *cert. denied*, 111 S. Ct. 581 (1990), revisited the issue of the

legal meaning of the phrase "restore to the public domain" and held that when used as operative statutory language, the phrase extinguishes reservation boundaries as to that land restored to the public domain. We set out an extended portion of the court's analysis of the legal effect of restoration language, an analysis not undertaken in *Ute Indian Tribe:*

> [R]ecent Supreme Court cases assume in dicta that congressional restoration language extinguished boundaries. *Mattz v. Arnett,* 412 U.S. 481, 490, 93 S.Ct. 2245, 2250, 37 L.Ed.2d 92 (1973), cites language from the Indian Appropriations Act of July 27, 1868, ch. CCXLVIII, 15 Stat. 198, 223, (Congress restored Mendocino Reservation lands "to the public lands") as clear and sufficient language of extinguishment of reservation boundaries. Similarly, *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 589, n.5, 600, 97 S.Ct. 1361, 1364 n.5, 1370, 51 L.Ed.2d 660 (1977), accepted restoration language in the Act of March 2, 1889, ch. 405, § 21, 25 Stat. 888, 896 (portion of the Great Sioux Reservation "restored to the public domain") as language demonstrating congressional intent to extinguish prior boundaries. Even Justice Marshall's dissent in *Rosebud* acknowledges that section twenty-one of the Act of March 2, 1889 expressly disestablished part of the Great Sioux Reservation by restoring it to the public domain. *Rosebud Sioux Tribe,* 430 U.S. at 618, 97 S.Ct. at 1379 (Marshall, J., dissenting). Furthermore in *Decoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), Justice White's majority opinion (holding that cession of Lake Traverse Indian Reservation lands disestablished the reservation boundaries) assumed that



> restoration language was the equivalent of extinguishment of reservation status for the lands affected. The Court stated: "That the lands ceded . . . were *returned to the public domain, stripped of reservation status,* can hardly be questioned. . . . The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.' " *DeCoteau,* 420 U.S. at 446, 95 S.Ct. at 1094 (emphasis added).
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> Other Supreme Court cases suggest that affected Indian Tribes understood EO [executive order] restoration language to be language canceling former EOs. In *Sioux Tribe of Indians v. United States,* 316 U.S. 317, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942), the Sioux sought compensation for the value of lands "restored to the public domain" but did not contest in that action, or any other of which we are aware, the fact that whatever Tribal interest had been created by additions to the Great Sioux Reservation under EOs of 1875 and 1876 had been terminated by the restoration language of the subsequent EOs of 1879 and 1884. (The Court itself viewed such language as the equivalent of "cancelling or revoking" an EO establishing a Reservation or adding thereto. *Sioux,* 316 U.S. at 330, 62 S.Ct. at 1101.) *See also Confederated Bands of Ute Indians v. United States,* 330 U.S. 169, 176, 67 S.Ct. 650, 653, 91 L.Ed. 823 (1947).
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> Evidence that lower courts have accepted the view that restoration language is synonymous with extinction of reservation status is found in *Russ v. Wilkins,* 410 F.Supp. 579 (N.D. Cal. 1976). "On many occasions Congress has unilaterally terminated sections of reservations

by restoring them to the public domain. . . . The Act of 1873 [pertaining to the Round Valley Reservation in California] specifically 'restored to the public lands' the 12,000 acres it severed from the Reservation." *Id.* at 581. The court found that a subsequent 1905 act failing to employ restoration language did not terminate the reservation in question.

In summary, federal court cases reveal that neither Congress, the courts, nor Indian tribes themselves have insisted that restoration language be accompanied by more explicit cancellation language. Rather, they have used or accepted simple, operative restoration language as language of reservation termination in many situations. We have found no case where operative restoration language was not accepted as language of termination.

*Yazzie*, 909 F.2d at 1402-04 (footnotes omitted). In *Yazzie*, the court criticized the conclusion in *Ute Indian Tribe* that the phrase "restore to the public domain" is not the same as a congressional state of mind to disestablish, and characterized it as "unexamined and unsupported." *Id.* at 1400. *Yazzie* clearly departs from the court's prior conclusion in *Ute Indian Tribe* as to the effect of restoration language. Indeed, *Yazzie* held that the use of operative restoration language diminishes a reservation as to the land restored to the public domain.

*Yazzie* is consistent with a long line of lower federal court and state court decisions. *See, e.g., Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 90 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977); *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 687-88 (8th Cir. 1973); *DeMarrias v. South Dakota*, 319 F.2d 845, 846 (8th Cir. 1963); *Russ v. Wilkins*, 624 F.2d



914-15, 924, 927-29 (9th Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 696 (9th Cir. 1976); *see also United States ex rel. Cook v. Parkinson*, 525 F.2d 120, 124 (8th Cir. 1975), *cert. denied*, 430 U.S. 982 (1977); *Putnam v. United States*, 248 F.2d 292, 295 (8th Cir. 1957); *Russ v. Wilkins*, 410 F. Supp. 579, 581 (N.D. Cal. 1976), *rev'd on other grounds*, 624 F.2d 914 (9th Cir. 1980); *United States ex rel. Condon v. Erickson*, 344 F. Supp. 777, 778 (D.S.D. 1972), *aff'd*, 478 F.2d 684 (8th Cir. 1973); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1005 (D. Minn. 1971); *Lafferty v. State*, 125 N.W.2d 171, 174 (S.D. 1963).

On the basis of the above, we conclude that operative statutory language that restores reservation land to the public domain is persuasive evidence of congressional intent to diminish the reservation as to the land so restored.

### B. Whether the Unallotted Lands Were Restored to the Public Domain Pursuant to the 1902 and 1905 Acts of Congress

Provisions in four statutes, the Indian Appropriation Acts of 1902, 1903, 1904, and 1905, dealt with the opening of the Uintah-Ouray Reservation. The next issue is whether, as a matter of statutory construction, the provision in the 1902 Act which stated that unallotted reservation lands would be "restored to the public domain" remained in effect when the Reservation was finally opened by a presidential proclamation in 1905. That issue turns on the language of the Acts in question.

For the reasons that follow, we hold that as a matter of statutory construction, the 1905 Act was merely amendatory and supplementary to the 1902 Act and therefore did not accomplish the opening of the Reservation independent of the 1902 Act. By way of a brief overview, we note that the pertinent statutes, legislative history, and contemporaneous and subsequent congressional, executive, and judicial constructions of the 1902 and 1905 Acts all show that the 1902 Act was considered the basic statute dealing with the opening of the Reservation and that the subsequent Acts did not repeal the 1902 Act's restoration language.

## 1. Establishment of the Uintah Reservation

The Indians who settled on the Uintah-Ouray Reservation consisted of several bands originally living in an area that included parts of what are now Colorado, Utah, and New Mexico. The Uintah Valley in eastern Utah was "set apart and reserved for the use and occupancy of Indian tribes" pursuant to an executive order issued by President Lincoln in 1861. I Kappler 900. In 1864, Congress authorized the Superintendent of Indian Affairs to bring together and settle in the Uintah Valley as many of the Indians living in the Utah Territory as practicable. Act of May 5, 1864, ch. 77, 13 Stat. 63. The Act set apart the Uintah Valley "for permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." Thus, the Reservation was neither created by treaty nor established for a specific tribe. Indeed, several different bands of Indians settled on the Reservation.



In 1888, the year after the enactment of the General Allotment Act, Congress, with the consent of the Indians, diminished the Uintah-Ouray Reservation by providing that approximately 7,000 acres, known as the Gilsonite Strip, were "to be public lands of the United States and restored to the public domain." Act of May 24, 1888, ch. 310, 25 Stat. 157. This Act concededly had the effect of diminishing the Reservation's boundaries. The United States District Court for the District of Utah so held in *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072, 1099 (D. Utah 1981), and the Tribe did not appeal that ruling.

Congress first sought to open the Uintah Reservation to non-Indian settlement by the Indian Appropriations Act of 1894. Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-38. The 1894 Act directed a commission to negotiate with the Indians for the "relinquishment to the United States" of lands not needed for allotments.[14] No agreement, however, was forthcoming. In 1898, Congress provided for the "cession" of unallotted Indian lands on the Uintah-Ouray Reservation to the United States, subject to the consent of the Indians. Act of June 4, 1898, ch. 376, 30

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[14] The 1894 Act also began the opening process on the neighboring Uncompahgre Reservation. The Act provided for a commission to determine which lands on the Uncompahgre Reservation were unsuited or not required for allotments so that such lands could be "restored to the public domain and made subject to entry. . . . " Pursuant to the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87, Congress mandated the allotment and opening of the Uncompahgre Reservation. *See Ute Indian Tribe*, 521 F. Supp. at 1105-10. We do not address the issue of whether the Uncompahgre Reservation has been disestablished. The Tenth Circuit held that it was not. *Ute Indian Tribe*, 772 F.2d at 1090-93; *id.* at 1093-99 (Seymour, J., concurring).

Stat. 429. Again, because of Indian resistance the purpose of this Act was not accomplished.

## 2. The Indian Appropriations Acts of 1902, 1903, 1904, and 1905

The Indian Appropriations Act of 1902 provided a comprehensive and detailed scheme for opening the Reservation. Act of May 27, 1902, ch. 888, 32 Stat. 245. In summary, the Act provided that (1) Indian consent was to be obtained; (2) allotments were to be made to the members of the Uintah and White River Tribes of Ute Indians, with 80 acres of irrigable, agricultural Reservation land allotted to each "head of the family" and 40 acres of such land allotted to each "other member of said tribes;" (3) the allotments were to be made prior to October 1, 1903; (4) all unallotted lands were to be "restored to the public domain" on October 1, 1903; (5) land opened for public entry under the homestead laws would be sold for $1.25 per acre; (6) the proceeds from the "sale of the lands so restored to the public domain" would be used first to reimburse the United States for money advanced to the Indians to effectuate the provisions of the Act and then for the benefit of the Uintah and White River Ute Indians; and (7) persons or companies having then-existing mineral leases approved by the Secretary of the Interior or permits to negotiate with the Indians for mineral leases on the Reservation were to have a preferential right, in lieu of such a lease or permit, to locate 640 acres of contiguous mining land under the mining laws up to "thirty days before said lands are restored to the public domain." It is important to note that the date fixed by the



1902 Act for restoring the unallotted lands to the public domain was also the date for opening the unallotted lands to public entry and for completing the allotments of land to the Indians. Thus, the same date was critical to all three interrelated events.

The 1902 Act provided:

> That *the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall be caused to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: Provided,* That persons entering any of said land under the homestead law shall pay therefore at the rate of one dollar and twenty-five cents per acre: *And provided further,* That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining

> Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and *the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians.*

(Emphasis added.)

Less than a month after enactment of the 1902 Act, a Joint Resolution was passed on June 19, 1902, providing for the establishment of a tribal grazing reserve and for certain allotments of Uintah Reservation lands to be made to Uncompahgre Indians.[15] J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744, 745 (1902). The 1902 Joint Resolution affirmed the proposition that after the allotments were made to the Indians and the grazing reserve was established, the surplus lands were to be restored "to the public domain."[16]

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[15] Although the 1902 Joint Resolution provided for allotments on the Uintah Reservation to Uncompahgre Utes, the Uncompahgre Utes did not share in the proceeds from the opened lands.

[16] The 1902 Joint Resolution provided in part:

> In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.
>
> All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to each head of a family and forty acres to each other Indian, and no more. The grazing land selected and set apart, as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named.
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> . . . .
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> *The item of seventy thousand and sixty-four dollars and forty-eight cents* appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, *shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.*

(Emphasis added.)



Prior to October 1, 1903, it became apparent that the surveying necessary to make the allotments to the Indians could not be completed and Indian consent would not be forthcoming. Accordingly, Congress enacted the Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-98. That Act specifically amended the 1902 Act in three respects: (1) It dispensed with the requirement that the Indians give their consent to the opening of the Reservation and the allotment program, although their consent was to be initially solicited; (2) it changed the October 1, 1903 date for "opening the unallotted lands to public entry on said Uintah Reservation as provided by

the Act of May twenty-seventh nineteen hundred and two" to October 1, 1904; and (3) it provided that the grazing reserve established by the 1902 Joint Resolution should be limited to 250,000 acres and should be located on lands south of the Strawberry River.[17] The provision in

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[17] The 1903 Act stated in pertinent part:

> To enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the purpose of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Walker River Reservation in Nevada, and the Uintah and White River Utes in Utah, and the joint resolution of June nineteenth, nineteen hundred and two, providing for the allotment of the Indians of Spokane Reservation in Washington, to be immediately available, one hundred and seventy-five thousand dollars: *Provided, however,* That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act: *And provided further,* That the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not exceed two hundred and fifty thousand acres: *And provided further,* That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May twenty-seventh, nineteen hundred and two, be, and the same is hereby, extended to October first, nineteen hundred and four.



the 1903 Act that the allotments to the Indians and the opening of the Reservation would proceed even without Indian consent was apparently based on the United States Supreme Court's decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), decided January 5, 1903, which held that Congress could unilaterally diminish a reservation.[18]

The 1903 Act also appropriated additional funds to pay for the surveying necessary to make the allotments to the Indians under the terms of the 1902 Act. Although the 1903 Act did not itself contain restoration language, it was clearly understood that the restoration language of the 1902 Act remained in effect.

Pursuant to the statutory direction, Indian consent was solicited. The Bureau of Indian Affairs instructed Inspector James McLaughlin to meet with the Indians and explain the provisions of the 1902 and 1903 Acts and, if possible, obtain their consent to the congressional program for the allotment of lands to the Indians and the restoration of the surplus lands to the public domain. *See* Letter from Acting Commissioner of Indian Affairs to James McLaughlin, United States Indian Inspector, at 5 (April 29, 1903). Inspector McLaughlin met with the

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[18] In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587-88 (1977), the Supreme Court specifically relied on *Lone Wolf* in holding that the absence of Indian consent did not defeat congressional intent to diminish or disestablish a reservation. *See also Solem v. Bartlett*, 465 U.S. 463, 471 n. 11 (1984).

Indians in May 1903 and explained that the allotments would be made with or without their consent and that the Reservation would be diminished. Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Utah and White River Ute Indians at Uintah Agency, Utah, from May 18 to 23, 1903, at 34-35. He explicitly explained the congressional intent to diminish the Reservation:

> My friends, Red Cap said my talk was cloudy, and you do not understand it. You are the people who are in the dark in regard to the force of this act of congress, and I am trying to bring you into the light. *You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but Congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation. Each of you will have a boundary to your individual holdings and there will also be a border to that 250,000 acre tract set apart for pasturage.*

*Id.* at 42 (emphasis added).

The surveying necessary to make allotments to the Indians could not be completed by October 1, 1904, the date fixed in the 1903 Act for opening the Reservation. As a result, in 1904, Congress amended the 1902 and 1903 Acts and extended the time for making allotments and opening the unallotted lands to entry to March 10, 1905. Act of April 21, 1904, ch. 1402, 33 Stat. 189, 207-08. The 1904 Act also appropriated additional funds to complete the necessary surveying and to "otherwise carry out the purposes of so much of the act of May twenty-seventh,



nineteen hundred and two . . . as provides for the allotment of the Indians of the Uintah and White River Utes in Utah."[19] All other terms of the 1902 Act, including the language restoring the unallotted lands to the public domain, were left intact.

Once again, however, the time fixed for making allotments and opening the unallotted lands to public entry could not be met. In early 1905, a Senate Resolution directed the Secretary of the Interior to report on the progress that had been made in making the allotments to the Indians under the provisions of the 1902 Act. S. Res., 39 Cong. Rec. 1863 (1905). The Secretary of the Interior responded in a letter, explaining at some length the steps taken "to comply with the provisions of the Act of May 27, 1902" and why the delay in opening the Reservation had occurred. S. Doc. No. 159, 58th Cong., 3d Sess. 1, 2-4 (1905). Attached to the Secretary's letter was a report from the Commissioner of Indian Affairs stating that still

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[19] The 1904 Act provided in its entirety:

> That the time for opening the unallotted lands to public entry on the Uintah Reservation, in Utah, as provided by the acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, be, and the same is hereby, extended to March tenth, nineteen hundred and five, and five thousand dollars is hereby appropriated to enable the Secretary of the Interior to do the necessary surveying, and otherwise carry out the purposes of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Uintah and White River Utes in Utah.

more time was necessary to complete the allotment process. *Id.* at 21-22. Because of the delay, the time for completing the allotments and opening the Reservation had to be extended again.

On March 3, 1905, prior to the date fixed for opening the Reservation by the 1904 Act, Congress enacted the Indian Appropriations Act of 1905. Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70. The 1905 Act expressly amended the date fixed by the 1904 Act "for opening to public entry the unallotted lands on the Uintah Reservation" and established September 1, 1905, as the new date "for opening said reservation," but authorized the President to fix the opening at an earlier date.[20] The 1905 Act

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[20] The pertinent part of the 1905 Act provided:

That so much of the act of March third, nineteen hundred and three, as provides that the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.

*That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five,* unless the President shall determine that the same may be opened at an earlier date and *that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows:* That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve,and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nine-



also repealed a portion of the 1903 Act that limited the location of the grazing reserve to the lands south of the

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teen hundred and two, shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *And provided further,* That all lands opened to settlement and entry under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the act of Congress of May twenty-seventh, nineteen hundred and two, and the acts amendatory thereof and supplemental thereto.

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May

Strawberry River. In addition, the Act added provisions authorizing the President to set apart Reservation lands for an addition to the Uintah Forest Reserve and for protecting the Indians' water supply or for general agricultural development.

Significantly, the language of the 1905 Act did not provide for the opening of the Uintah Reservation – that was done by the 1902 Act. Rather, the 1905 Act merely provided, "*That the time for opening said reservation shall be extended* to the first of September, nineteen hundred and five . . . ," and then specified only "*the manner of opening*. . . . " (Emphasis added.) The position of the Tenth Circuit in *Ute Indian Tribe* that the 1905 Act "opened" the Reservation simply is not, in our view, consistent with the language of the Act. On its face, the 1905 Act merely set a new date for when the opening was to occur and the manner of such opening. The operative statutory language which actually provided for the opening of the unallotted lands was found in the 1902 Act.

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twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided*, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.

(Emphasis added.)



Clearly, nothing in the language of the 1905 Act indicates that Congress intended to repeal either the 1902 Act in total or the language of the 1902 Act restoring the unallotted lands to the public domain. Nor is there anything in the legislative history of the 1905 Act to that effect. On the contrary, in enacting the 1905 Act, Congress acted on the premise that the provisions of the 1902 and 1903 Acts and the 1902 Joint Resolution continued in effect. Indeed, with surgical precision, Congress expressly repealed a specific, but minor, part of the 1903 Act dealing with the location of the grazing reserve.

The language of the 1905 Act shows that Congress intended to amend the 1902 Act only by limiting "the manner of opening" the lands. The Act restricted initial entry on the opened lands to settlement under the homestead and town-site laws for a period of five years; after that, the lands were to be sold for cash in parcels not larger than 640 acres. The purpose of the amendment was to prevent the opened lands from falling into the hands of land speculators and to assure that the opened land would initially be used for agricultural purposes. *See* 39 Cong. Rec. 1185-86 (1905); *Indian Appropriation Bill, 1906: Hearings before the Subcomm. of the Comm. on Indian Affairs of the Senate*, 58th Cong., 3d Sess. 29-30 (1905).

The temporary limitation on the manner of entry under the homestead and town-site laws was patterned after the scheme used in the opening of the Rosebud Reservation. *See* 39 Cong. Rec. 1183 (1905). In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 608 (1977), the Court set out section 2 of the 1907 Act that was at issue there:

> Section 2 provides for the disposition of lands under the "general provisions of the homestead and town-site laws," while § 3 specifies land purchase prices, with the proviso that "any lands remaining unsold after the said lands have been opened to entry for seven years may be sold to the highest bidder for cash, without regard to the above minimum limit of price."

The Court saw nothing inconsistent with the diminishment of the Rosebud Sioux Reservation and the provisions temporarily limiting entry into the opened lands. *Id.* at 609. Similarly, in *DeCoteau v. District County Court*, 420 U.S. 425, 442, 449 (1975), the Court held that an 1891 Act terminated the Lake Traverse Indian Reservation despite a provision in the Act opening lands "only to entry and settlement [at $2.50 per acre] under the homestead and townsite laws of the United States."

In sum, the language and legislative history of the 1905 Act show that Congress intended only to amend specific aspects of the 1902, 1903, and 1904 Acts and to provide additional authority to the President to set aside Reservation lands for specific uses. Except as specifically amended, Congress did not intend to change the basic features of the 1902 and 1903 Acts.[21] All language in the earlier Acts not specifically amended or repealed remained part of the statutory scheme dealing with the opening of the Reservation. Thus, after enactment of the 1905 Act, the 1902 Act remained in full force and effect with respect to (1) providing for allotments to heads of

[21] Unlike the 1902 and 1903 Acts, the 1904 Act added nothing substantive to the overall statutory scheme. It only extended the time for the opening.



households and members of the Uintah and White River Tribes and for the amount of acreage for each allotment; (2) restoring the unallotted lands to the public domain; (3) fixing the price to be paid per acre by homesteaders; (4) providing how and to whose benefit the proceeds derived from the sale of the unallotted lands were to be applied; and (5) protecting certain mineral rights. Of course, the provision in the 1902 Joint Resolution establishing the grazing reserve also remained in effect, although the 1905 Act repealed one minor aspect of the 1903 Act having to do with the location of the reserve.

We conclude that the 1902 Act established the basic statutory authority for opening the Uintah Reservation and that Congress intended thereby to diminish the Reservation. The congressional intent to diminish, as well as other essential aspects of the opening of the Reservation that were established by the 1902 Act, remained in full force and effect through the enactment of the 1902 Joint Resolution and the 1903, 1904, and 1905 Acts. The 1902 Act established more than a "baseline purpose" of restoring unallotted, unreserved lands to the public domain. *See Rosebud*, 430 U.S. at 592. The Act, on its face, provided for the opening of the Uintah Reservation. In short, the restoration language of the 1902 Act was operative statutory language when the opening finally occurred in 1905.

### 3. Contemporaneous and Subsequent Construction of the 1902 and 1905 Acts

The conclusion that the 1902 Act established the basic principles governing the opening of the Uintah Reservation is confirmed by subsequent presidential

proclamations, congressional acts, executive department orders, and court decisions.

As stated earlier, the 1905 Act authorized the President to open the Reservation prior to September 1, 1905. The actual opening of the Reservation was effectuated by the Presidential Proclamation of July 14, 1905, 34 Stat. 3119. The Proclamation expressly recognized the continuing operative effect of the 1902 Act and the public domain language therein, as well as the amendatory nature of the 1903, 1904, and 1905 Acts. The Proclamation stated that the time for opening the unallotted lands of the Uintah Reservation had been extended by the 1903, 1904, and 1905 Acts. More importantly, the Proclamation recognized the disestablishment of the Reservation as to the unallotted lands by quoting the language of the 1902 Act that the unallotted lands in the Uintah Reservation " 'shall be restored to the public domain.' " The Proclamation also quoted the language in the 1902 Act that fixed the price to be paid for homesteaded land: " 'persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre.' "[22] The Proclamation stated in pertinent part:

> *Whereas it was provided by the Act of Congress, approved May 27, A. D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "shall be restored to the public domain: Provided, That persons entering any of said*

[22] That the 1905 Act failed to fix a specific price to be paid for opened lands does not militate against diminishment. *See Solem*, 465 U.S. at 471; *Rosebud*, 430 U.S. at 596 n. 18.



> *lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre."*
>
> *And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069). . . .*
>
> . . . .
>
> Now, therefore, I Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States. . . .

*Id.* at 3119-20 (emphasis added).

By quoting the language from the 1902 Act that "restored" the unallotted land to "the public domain" and fixed the price to be paid per acre by homesteaders, the Proclamation demonstrates that the President deemed both provisions to be operative statutory positions governing the opened lands. The additional citation to the 1903, 1904, and 1905 Acts indicates that the President considered all four Acts relevant to the opening of the

Reservation to public entry. The presidential conclusion that the 1902 Act restored the opened land "to the public domain" is an unambiguous and contemporaneous statement by the nation's Chief Executive as to how the 1902 and 1905 Acts should be construed and is therefore entitled to significant weight. *See Rosebud*, 430 U.S. at 602-03.

In addition, the Presidential Proclamation of September 1, 1906, 34 Stat. 3228, confirms the proposition that Congress intended that the unallotted lands be restored to the public domain and that the Reservation be diminished under the 1902 Act. The 1906 Proclamation dealt with a homestead entry that infringed on the Indian grazing reserve established by the 1902 Joint Resolution, as amended by the 1903 and 1905 Acts. The Proclamation adopted essentially the same construction of the operative Acts as the 1905 Proclamation. It implicitly recognized the diminishment of the boundaries of the Reservation by referring to the "former Uintah Indian Reservation in Utah" and by "restor[ing]" a small parcel of land from the grazing reserve "to the public domain" so as to make it subject to entry. The parcel had been erroneously located on a small part of the reserve and had been improved by the homesteader. Had the surplus reservation lands not been restored to the public domain by the 1902 Act, it would have been pointless to transfer the parcel from the grazing reserve to the public domain. The Proclamation stated:

> WHEREAS, the Secretary of the Interior, on July 11, 1905, *under the authority of the act of June 19, 1902 (32 Stats., 744) amended by the act of March 3, 1903 (32 Stats., 982, 998) and March 3, 1905 (33 Stats., 1048, 1069), reserved certain lands*



> *in the former Uintah Indian Reservation in Utah,* including Lots 2 and 13 in Sec. 10, T. 2 S., R. 1 E., containing 8.80 acres, for the Uintah Indian Grazing Reserve; and whereas, the President of the United States in his proclamation of July 14, 1905, opening the lands in the said Uintah Reservation to settlement and entry, excepted from such opening the lands included in said grazing reserve; and whereas one David Eskelson was, on September 26, 1905, erroneously allowed to include in his homestead entry No. 806, the said Lots 2 and 13, on which lots he has placed valuable improvements, and which, by virtue of their small area and being entirely segregated from the balance of the grazing reserve by the claims of the Raven Mining Company, are of no value as a part of said reserve:
>
> Now, therefore, I, THEODORE ROOSEVELT, President of the United States, by virtue of the power in me vested, do hereby declare and make known that the *lots numbered 2 and 13 of Section 10, Township 2 S., of Range 1 E., Uintah Special Meridian, in Utah, are hereby restored to the public domain.*

(Emphasis added.)

Congressional enactments after 1905 dealing with the Reservation were also based on the premise that the public domain language in the 1902 Act diminished the Reservation's boundaries. In every instance of which we are aware, the 1903, 1904, and 1905 Acts were viewed as amendatory and supplementary to the 1902 Act and as consistent with the proposition that the opened lands had been restored to the public domain.

A 1906 Act extended the time for homesteaders to establish their residence on the opened lands. Act of January 27, 1906, 34 Stat. 9. The Act specifically referred to the unallotted Uintah Reservation lands as "*heretofore a part of the Uinta Indian Reservation*, within the counties of Uinta and Wasatch, in the State of Utah, *opened under the Acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, and March third, nineteen hundred and five.*" (Emphasis added.) Similarly, in 1912, Congress provided an extension of time to make payment and proof of entry for "any person who has heretofore made a homestead entry *for land which was formerly a part of the Uintah Indian Reservation* in the State of Utah, *authorized by the Act approved May twenty-seventh, nineteen hundred and two, and Acts amendatory thereto. . . .* " Act of July 20, 1912, ch. 244, 37 Stat. 196-97 (emphasis added).

Both the 1906 and the 1912 Acts are similar to a 1905 Act discussed in *Rosebud* that extended the time for settlers to establish homesteads on former lands of the Rosebud Sioux Reservation. That Act referred to " 'lands which were *heretofore* a part of the Rosebud Indian Reservation.' " *Rosebud*, 430 U.S. at 603 n.25 (emphasis in original). The Supreme Court characterized this statutory language as "additional evidence of the congressional intent to disestablish." The same conclusion applies here.

The Indian Appropriations Acts of 1910 and 1911 provide still further evidence of diminishment. The 1910 Act appropriated $5000 for the straightening of the Duchesne River "to be reimbursed to the United States out of the proceeds of the sale of lands within the *ceded* Uintah Indian Reservation opened to entry under the Act of May



twenty-seventh, nineteen hundred and two." (Emphasis added.) Similarly, the 1911 Act provided $15,000 to build a bridge across the Duchesne River. Act of March 3, 1911, ch. 210, 36 Stat. 1073-74. The funds were to be reimbursed to the United States from the "sale of lands within the *ceded* Uintah Indian Reservation open to entry under the act of May twenty-seventh, nineteen hundred and two." (Emphasis added.) The term "ceded" in the 1910 and 1911 Acts may be technically misused, but in the context of the Acts, the term clearly refers to land that was detached from the Reservation by the 1902 Act. *See Rosebud*, 430 U.S. at 597-98.

The 1910 Act also appropriated funds to pay the Indians for land in the "former Uintah Indian Reservation" that was set apart by the President under the authority of the 1905 Act for reservoir and irrigation purposes in connection with the Strawberry River reclamation project.[23] Act of April 4, 1910, ch. 140, 36 Stat. 284-85. The funds that were to be paid the Indians for this land were to be provided by the owners of the lands irrigated by the project. The 1910 Act also provided, "All right, title, and interest of the Indians in the said lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project." 36 Stat. 285.

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[23] Pursuant to the authority of the 1905 Act, the President withdrew 56,000 acres for the Strawberry River reclamation project. Presidential Proclamation of August 3, 1905, 34 Stat. 3141. This withdrawal diminished the Reservation. *See Ute Indian Tribe*, 716 F.2d at 1314, *rev'd on other grounds*, 773 F.2d 1087.

The use of extinguishment language in the 1910 Act does not support a conclusion that Congress would have used this type of explicit language of diminishment in the 1902 Act if Congress had intended to diminish the Reservation. The lands that were detached from Indian ownership and jurisdiction under the 1910 Act passed directly from the Reservation as it existed *after* 1905 to a specific type of private use and did not ever become part of the public domain. Indeed, because of the specified use to which the detached lands were put, it would have been inappropriate to restore those lands to the public domain. For that reason, the more explicit diminishment language in the 1910 Act was necessary.

Statements of executive department officials and congressional committees have also consistently concluded that the opened lands were restored to the public domain by the 1902 Act. In 1911, E. P. Holcombe and James M. McLaughlin filed a report with the Department of the Interior concerning the Uintah Reservation. The report stated that on July 14, 1905, "the President issued a proclamation opening the lands to entry August 28, 1905, . . . and there were restored to the public domain to be disposed for the benefit of the Indians about 1,004,005 acres."[24] H.R. Doc. No. 892, 62d Cong., 2d Sess. 1-2 (1912). A 1941 report of the Senate Committee on Indian

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[24] We note that this acreage figure is difficult to reconcile with other figures in this opinion dealing with the amount of land restored to the public domain, *see supra* at 8-9 & n.10, and appears inaccurate.



Affairs, issued before the 1945 Order of Restoration, discussed *infra*, and before the addition of the Hill Creek Extension, stated:

> The Uintah and Ouray Indian Reservation was established in 1861 for the Uintah, Uncompahgre, and White River Bands of the Ute Indians. The original area of the reservation was approximately 2,039,040 acres. Cessions were made to the United States at various times so that at present the reservation embraces but 366,000 acres or less than one-fifth of the original.

S. Rep. No. 243, 77th Cong., 1st Sess. 3 (1941); *see also*, H.R. Rep. No. 2047, 69th Cong., 2d Sess. 2 (1927); H.R. Rep. No. 2503, 82d Cong., 2d Sess., 2, 3 (1952).

Official action of the Secretary of the Interior also provides persuasive evidence of executive department recognition of diminishment. In 1934, Congress authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States. . . . " Act of June 18, 1934, ch. 576, 48 Stat. 984. In 1945, the Secretary of the Interior issued an "Order of Restoration" pursuant to the 1934 Act that restored to the Uintah Reservation 217,000 acres of the undisposed, opened lands that remained in the public domain. That Order restored both the *ownership* of those lands to the Tribe and, by making the lands part of the Reservation, the *tribal jurisdiction* over them. The Order stated:

Whereas, pursuant to the provisions of the act of May 27, 1902 (32 Stat., 263), as amended, the unallotted lands of the Uintah and Ouray Indian Reservation in the State of Utah, were made subject to disposal under the laws of the United States applying to public lands, and

Whereas, there are now remaining undisposed of within said area approximately 217,000 acres of unallotted lands, which need closer administrative control in the interest of better conservation practices, and

Whereas, by relinquishment and cancellation of homestead entries within this area a limited additional acreage of land of similar character may later be included within this class of undisposed-of opened land, and

Whereas, the Tribal Council, the Superintendent of the Uintah and Ouray Agency, and the Commission of Indian Affairs have recommended restoration to tribal ownership of such undisposed-of surplus unallotted lands in the said reservation,

Now, therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the act of June 18, 1934 (48 Stat. 984), I hereby find that the restoration to tribal ownership of *all lands which are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ourah Reservation* will be in the public interest, and the said lands *are hereby restored to tribal ownership* for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah, *and are added to and made a part of the existing reservation, subject to any valid existing rights.*



Order Notice, 10 Fed. Reg. 12,409 (1945) (emphasis added).

The law is clear that if mere legal title to opened surplus lands passed to non-Indians, such lands remained part of the reservation, and restoring the opened lands to tribal ownership would have no effect on their status as reservation lands, since by definition they never left the reservation. But if tribal boundaries were diminished when the surplus lands were opened, the return of those lands to the reservation would enlarge the boundaries of the reservation. *See Solem*, 465 U.S. at 467-68. Thus, in restoring both the ownership of and the jurisdiction over the lands to the Tribe, the 1945 Order of Restoration was premised squarely on the proposition that the 1902 Act disestablished the Reservation as to the opened lands.

More recent evidence that the restoration language of the 1902 Act was operative at the time of the opening is found in a 1971 order of the Secretary of the Interior revoking a 1930 withdrawal of oil shale lands because the initial withdrawal had clouded title to part of the Uintah Reservation grazing and timber reserve, the allotted lands, and the lands restored to the public domain by the 1902 Act and later restored to the Reservation under the 1945 Order of Restoration. Order Notice, 36 Fed. Reg. 19,920 (1972). The 1971 Order recited the legal history of the Reservation, including the restoration of the "unallotted lands of the Uintah and Ouray Indian Reservation . . . to the public domain." Part of the Order stated:

> Whereas, pursuant to the provisions of the Act of May 27, 1902 (32 Stat. 263), as amended and supplemented by the Acts of March 3, 1903

> (32 Stat. 998); April 21, 1904 (33 Stat. 207); March 3, 1905 (33 Stat. 1069); and May 14, 1920 (41 Stat. 599); most of the unallotted lands of the Uintah and Ouray Indian Reservation in Utah were restored to the public domain with the proceeds from the sale of said lands to be used for the benefit of the Indians. . . .

In addition, both the Department of Justice and the Ute Tribe have formally stipulated that the unallotted, opened lands were restored to the public domain by the 1902 Act. In its amicus brief filed in connection with the petition for a writ of certiorari in *Ute Indian Tribe*, the Department noted that both it and the Uintah and White River Bands of Ute Indians had stipulated that the Indians on the Uintah-Ouray Reservation " 'received individual allotments thereon pursuant to the Act of May 27, 1902, as amended,' and that surplus lands were 'restored to the public domain' pursuant to the 1902 Act 'and amendments thereto.' "[25] The stipulation was filed with the Court of Claims in conjunction with the litigation in *Uintah and White River Bands of Ute Indians v. United States*, 139 Ct. Cl. 1 (1957).

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[25] Brief of the United States in opposition as Amicus Curiae, *Utah v. Ute Indian Tribe*, on petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit, No. 85-1821, October Term 1986, at 13 n.7, *cert. denied*, 479 U.S. 994 (1986). The Department of Justice stated in its amicus brief, "The quoted passages do not suggest that the 1902 Act was the sole basis for allotment and opening; to the contrary, they make clear that the substantive provisions of the 1902 Act were 'amended.' " That point, however, has never been contested. What is significant is that the Department formally acknowledged in court that the surplus lands had been restored to the public domain pursuant to the 1902 Act and the amendments thereto.



The Ute Tribe has also acknowledged that the Reservation had been diminished. The Tenth Circuit's panel opinion in *Ute Indian Tribe* stated:

> [T]he 1957 Ute Ten Year Development Program provides a description of the total acreage of the Uintah and Ouray reservation as currently containing 1,010,000 acres. In detail, it delineates, "The original area of the Uintah Reservation in Wasatch, Duchesne and Uintah Counties [was] reduced as follows. . . . " (The document then details the Gilsonite Strip reduction, the 1905 addition to the Uintah Forest Reserve, the Strawberry River reduction, the 1902 grazing reserve and allotments to individual Indians and "[a]pproximately 798,877 acres were disposed of by the United States for cash, or otherwise set aside and taken for its own use at various times since the opening of the reservation in 1905.").

*Ute Indian Tribe v. Utah*, 716 F.2d 1298, 1313 (10th Cir. 1983, *vacated*, 773 F.2d 1087 (10th Cir. 1985) (en banc).

As recently as 1977, the Forest Service took the position that the Ashley and Uintah National Forests and the High Uintah Wilderness were not part of the Reservation because "the original Uintah Reservation boundaries were disestablished and present Reservation boundaries include only the trust lands."[26] Moreover, Department of Interior officials have consistently viewed only the trust lands (the tribal grazing reserve, allotments, and land

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[26] Brief of Duchesne and Uintah Counties as Amici Curiae, at 16 (quoting Letter from United States Forest Service to Scott M. Matheson, Governor of Utah (April 8, 1977)).

later restored to tribal ownership and reservation status) as the lands that lie within the Reservation.[27]

Finally, a number of court decisions have also stated or held that the language in the 1902 Act restoring the unallotted lands to the public domain was operative when the Reservation was opened in 1905 and that the 1905 Act simply extended the time for opening the unallotted, unreserved lands to public entry. In *Sowards v. Meagher*, 37 Utah 212, 108 P. 1112 (1910), the issue was whether an application was properly made to the Utah State Engineer for an award of water rights to be used on land that was opened to public entry in 1905. This Court reviewed the statutes dealing with the opening of the Reservation, beginning with the 1902 Act, and stated:

> It may be judicially noticed, and here stated, that Congress in 1902 ordered the unallotted lands of the Indian reservation referred to in the complaint to be restored to the public domain on the 1st day of August, 1903. That time was extended to October 1, 1904, and again to March

[27] H.R. Rep. No. 5010, 59th Cong., 1st Sess. 1-2 (1906); Letter from C. F. Darrabee, Acting Commissioner of Office of Indian Affairs to H. C. Means, Superintendent of Irrigation Survey, Whiterocks, Utah 1-2 (September 26, 1907); Letter from First Assistant Secretary of Department of the Interior to Commission of Indian Affairs (November 8, 1907); Letter from Secretary of the Department of the Interior to Secretary of the Treasury (December 19, 1908); 1929 Annual Report of Uintah and Ouray Agency, Fort Duchesne, Utah 1; 1931 Annual Report of Uintah and Ouray Agency, Fort Duchesne, Utah 4-6; 1932 Annual Report of Uintah and Ourah Agency, Fort Duchesne, Utah 1-2; Bureau of Indian Affairs, Phoenix Area Office, *Information Profiles of Indian Reservations in Arizona, Nevada & Utah* 155 (1976).



> 10, 1905. On March 3, 1905, Congress again extended such time to September 1, 1905, but authorized the President of the United States by proclamation to fix an earlier time. Thereupon, the President, on the 14th day of July, 1905, issued a proclamation restoring the unallotted lands of the reservation to the public domain, and declaring such lands open to entry, settlement, and disposition on and after the 28th day of August, 1905.

108 P. at 1114. Although it cannot be said, as a technical matter, that the *Sowards* opinion specifically addressed the question of whether the Reservation was disestablished as to the lands that were returned to the public domain, it is clear that this Court held that the 1905 Act amended the 1902 Act and that the 1902 Act restored the open, unallotted lands to the public domain. *See also White Rocks Irrigation Co. v. Mooseman*, 45 Utah 79, 141 P. 459, 460 (1914).

The Court of Claims' opinion in *Uintah and White River Bands of Ute Indians v. United States*, 139 Ct. Cl. 1 (1957), reached the same conclusion. That case awarded compensation to the Uintah and White River Utes for the withdrawal by the United States of the lands that were set apart and added to the Uintah Forest Reserve pursuant to the 1905 Act. In the course of the opinion, the court stated that after the allotments to the Indians were made, the surplus lands were opened to public entry and the proceeds from these lands totalling $1,184,996.33 were credited to the account of the Uintah and White River Utes. *Id.* at 22. With respect to the 1902 Act, the court stated that "surplus lands (with the exception of forest reserve and reclamation withdrawals and certain mineral

entries) were restored to the public domain, and opened for disposition under the public land laws for the benefit of the Indians." *Id.*

The same construction was placed on the 1902 and 1905 Acts by the Court of Appeals for the Tenth Circuit in *Hansen v. United States*, 153 F.2d 162 (10th Cir. 1946). *Hansen* held that the 1902 Act restored the unallotted lands "to the public domain" and that the 1903, 1904, and 1905 Acts "extended the time for opening the unallotted lands to the public domain." *Id.* at 163. This opinion was handed down just a few months after the 1945 Order of Restoration by the Secretary of the Interior and apparently without knowledge of it, for the Court noted, "Approximately 220,000 acres of the lands restored to the public domain by the Act of May 27, 1902, remain undisposed of." *Id.*

In *United States v. Boss*, 160 Fed. 132 (D. Utah 1906), the United States District Court for the District of Utah dismissed an indictment which charged that the defendant knowingly introduced intoxicating liquor into Indian country in violation of federal law. The crime had occurred after the opening of the Uintah Reservation in 1905 on unallotted land that had been reserved by the Secretary of the Interior for school and Uintah Agency purposes. The court traced the legislative history of the Uintah Reservation, including the interdependence of the 1902 and 1905 Acts, and found *Ex parte Dick*, 141 Fed. 5 (9th Cir. 1905), *rev'd on other grounds*, 202 U.S. 132 (1906), dispositive. In *Dick*, the Ninth Circuit vacated the federal conviction of a defendant for knowingly introducing intoxicating liquor into Indian country because the crime had occurred on land over which the state had exclusive



jurisdiction. The sale of liquor in *Dick* occurred on Nez Perce Reservation land the had been ceded to the United States by a congressional act and sold to a municipal corporation. The court concluded, "In the present case, the sale of liquor was made in a municipal territory clearly within the jurisdiction of the state, and outside the jurisdiction of the United States." *Dick*, 141 Fed. at 8. Thus, *Boss*'s dismissal of the indictment for lack of federal jurisdiction and its reliance on *Dick* implicitly acknowledged that the unallotted lands of the Uintah Reservation had been restored to the public domain and were therefore subject to the state's exclusive jurisdiction. *See also United States v. Fitzgerald*, 201 Fed. 295, 296 (8th Cir. 1912) (referring to "the former Uintah Indian Reservation").

In sum, Congress, the President, executive department agencies, including the Department of Justice, the Department of the Interior, the Bureau of Indian Affairs, and the Forest Service, the courts, and the Ute Tribe itself have acted on the premise that the restoration language in the 1902 Act restored the unallotted, surplus land in the Uintah-Ouray Indian Reservaion to the public domain when the Reservation was finally opened in 1905 and diminished the Reservation as to that land.

## III. CONCLUSION

The 1902, 1903, 1904, and 1905 Acts, carefully analyzed, require the conclusion that the restoration language in the 1902 Act continued in operative effect as part of the scheme for opening the Reservation and that the 1905 Act simply amended and supplemented the 1902 Act. The 1905 Act did not restate the proposition that the

unallotted, unreserved lands were restored to the public domain. Nor did it restate several other legal principles established in the 1902 Act that also governed the opening of the Reservation. As an act that amended and supplemented the 1902 Act, there was no need for the 1905 Act to restate that which was already established. Simply stated, the 1905 Act did not stand alone in opening the Reservation; it only extended the time for opening the Reservation under the 1902 Act and provided for the manner of the opening. The fact that the 1905 Act allowed settlement on the opened lands only under the homestead and town-site acts for a period of five years does not compel a different conclusion, nor does the fact that the Uintah and White River Utes were not paid a sum certain for the opened lands. Because the restoration language in the 1902 Act was never repealed, it remained in effect, and the Reservation was diminished. This case cannot therefore be disposed of under the rulings in *Rosebud*, *Mattz*, and *Seymour* that surplus land acts that simply "open" reservation lands to entry by non-Indians do not diminish the reservation.

In conclusion, we hold that the unallotted, unreserved lands of the Uintah Reservation were restored to the public domain by the 1902 Act as amended by the 1903, 1904, and 1905 Acts, and that the Reservation boundaries were diminished by that restoration. The Reservation boundaries were further diminished by the withdrawal for the Strawberry River reclamation project and later enlarged by the 1945 Order of Restoration an the



1948 Hill Creek Expansion.[28] Since Myton, Utah, lies outside the boundaries of the Reservation so described, it is not within Indian country. Therefore, the district court had subject matter jurisdiciton over the burglary and the prosecution of Clinton Perank.

Affirmed.

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[28] We do not address the issue of whether the 1905 addition to the Uintah National Forest diminished the Reservation. The Tenth Circuit *en banc*, decision in *Ute Indian Tribe* held that it was not thereby diminished, 773 F.2d at 1089-90; *id.* at 1099-1101 (Seymour, J., concurring), whereas that court's panel decision and the decision of the United States District Court for the District of Utah held otherwise. 716 F.2d at 1313-14; 521 F. Supp. at 1136-37. It is significant to note that the 1905 Act, which granted the President the authority to reserve unallotted lands in the Reservation as an addition to the Uintah Forest Reserve, specifically provided that such lands would be "subject to the laws, rules, and regulations governing forest reserves. . . . " 33 Stat. 1070. The full text of the statute is set out at n.20 *supra*. It was pursuant to this statutory authority that President Roosevelt withdrew 1,010,000 acres from the Uintah Reservation for the national forest by the Proclamation of July 14, 1905, 34 Stat. 3116. The administrative authority over these lands was transferred from the Secretary of the Interior and the Bureau of Indian Affairs to the Secretary of Agriculture pursuant to the Act of February 1, 1905, ch. 288, 33 Stat. 628, and subjected to the jurisdiction of the Forest Service. In his dissenting opinion in *Ute Indian Tribe*, 773 F.2d at 1115, Judge Seth stated that Congress clearly evidenced an intent to remove the lands from the Reservation by the transfer of reservation status and administrative authority. *See also United States v. Gimmell*, 535 F.2d 1145, 1149 (9th Cir. 1976) (continuous use of forest land for conservation and recreation strongly suggests extinguishment of Indians' title). The Utes were paid $1,217,000 in compensation for the forest reserve lands. *See Uintah and White River Bands of Ute Indians v. United States*, 139 Ct. Cl. 1, 7, 27-29 (1957).

WE CONCUR:

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Gordon R. Hall, Chief Justice

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Richard C. Howe, Associated Chief Justice

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Christine M. Durham, Justice

ZIMMERMAN, Justice: (Dissenting)

I dissent. I cannot join the majority in interpreting a federal statute that affects the boundaries of the Uintah-Ouray Indian Reservation in a way which contradicts the construction approved by a majority of the entire United States Court of Appeals for the Tenth Circuit. I find almost incredible the refusal of the majority of this court to accord comity to a federal court's decision in an area in which the federal government has preeminent authority and a unique trust responsibility. A majority of this court has given the State of Utah what it has desperately sought for six years – a second shot at persuading the United States Supreme Court to reject the Tenth Circuit's ruling and to give Utah control over a large part of the original reservation. This litigation certainly will not end here, now that there is a square conflict between the entire Tenth Circuit and this court. But this tactical victory for the State comes at an unacceptably high cost to the relationship between the state and federal judiciaries. Moreover, on the merits, I think the majority reaches the wrong result.

This case arises in the context of Clinton Perank's appeal challenging Utah's assertion of criminal jurisdiction over him. The State has taken advantage of Perank's



appeal from a relatively minor criminal conviction to relitigate the question of the Uintah-Ouray Indian Reservation boundaries. In a separate federal proceeding seven years ago, the Tenth Circuit decided these boundaries against the State. *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986). Now, the State seeks to reopen the boundary issue in a new forum.

I would object to the State's opportunistic misuse of Perank's petty criminal prosecution to readjudicate a settled issued under any circumstance, but the unequal and inadequate briefing of the boundary issue in this case makes it a particularly poor vehicle for bringing us into a direct confrontation with the Tenth Circuit. Perank's brief contained a total of six pages of argument, the bulk of it concerning his assertion that he is an Indian. He allotted fewer than two pages to jurisdictional and boundary issues. In contrast, the State filed a fifty-page brief, devoting the majority of it to an attack on the Tenth Circuit's decision in *Ute Indian Tribe* and to a reargument of the boundary issue. In addition to the disparate treatment of the boundary issue by the immediate parties, Uintah and Duchesne Counties, which were also parties to the Tenth Circuit action, lodged a seventeen-page amicus brief supporting the State's position. Recognizing the one-sidedness of the proceeding, the State's counsel acknowledged at oral argument that perhaps the State's real adversary in this case – the Tenth Circuit – was absent.

We made an attempt to cure the one-sidedness of the briefing by soliciting participation by other parties with interests in this case. Unfortunately, we met with little success. At our invitation, the Ute Indian Tribe filed an

amicus brief. However, apparently believing that we would not consider overturning the result of the Tenth Circuit's en banc decision, the Tribe, rather that addressing the impact of the Tenth Circuit's decision on our consideration of the issue or the merits of the boundary dispute, argued only that Perank was not a member of the Tribe and was therefore not in a position to challenge the state court's jurisdiction over him.

The week before argument, we contacted the State and encouraged it to inform the United States Attorney of the upcoming argument and to inquire whether the Justice Department wished to present its position before this court. The Justice Department did not appear at argument. We then invited the Justice Department to brief its position as an amicus. However, the Justice Department, demonstrating a surprising lack of interest in the case, refused to brief the matter and submitted only the brief it had filed years earlier in opposition to the State's petition for a writ of certiorari to the Tenth Circuit in *Ute Indian Tribe*. Thus, the State's arguments on the boundary question were virtually unchallenged.

Notwithstanding the lack of a true adversary proceeding on the boundary issue, the majority eagerly proceeds to the merits of the boundary dispute and takes a position contrary to that of a majority of the entire Tenth Circuit. I would find a direct confrontation with the Tenth Circuit on an essentially federal issue something to be avoided under any circumstances, but this court's rush to adjudicate the issue is especially egregious given the importance of this question and the fact that the interests of all parties affected in the proceeding are not fairly before this court.



The reason I would not reach the merits of the boundary issue can be summed up in one word: comity. Under the doctrine of comity, courts of one jurisdiction will give effect to the laws and judicial decision of another out of deference and mutual respect. *See, e.g., Pan Energy v. Martin*, 813 P.2d 1142, 1146 (Utah 1991); *Tracy v. Superior Court*, 810 P.2d 1030, 1041 (Ariz. 1991); *Perrenoud v. Perrenoud*, 480 P.2d 749, 760 (Kan. 1971); *In re Custody of Sengstock*, 477 N.W.2d 310, 314 (Wis. Ct. App. 1991). *See generally* 21 C.J.S. *Courts* § 210 (1990). The scope and applicability of the comity doctrine are committed to the sound discretion of each court. *See, e.g., Pan Energy*, 813 P.2d at 1146; *State ex rel. Speer v. Haynes*, 392 So.2d 1183, 1185 (Ala. Civ. Ct. App. 1979), *rev'd on other grounds sub nom. Ex Parte Haynes*, 392 So.2d 1187 (Ala. 1988); *Tracy*, 810 P.2d at 1041; *Philadelphia v. Austin*, 429 A.2d 568, 572 (N.J. 1981); *Sheridan v. Sheridan*, 223 N.W. 2d 557, 560 (Wis. 1975). The instant case presents compelling reasons to follow the rules of comity and defer to the Tenth Circuit's resolution of the boundary issue.

As a general proposition, we should defer to decisions of coordinate courts that have resolved the precise issue we face, unless doing so would contravene the laws or policy of this state. *See, e.g., Philadelphia*, 429 A.2d at 572; *In re Custody of Sengstock*, 477 N.W.2d at 314. Although we have an interest in determining the scope of our own jurisdiction, I know of no existing state law or policy that would preclude us from deferring to the Tenth Circuit's determination of the boundaries of the Uintah-

Ouray Indian Reservation.[1] For example, if we were to defer to the Tenth Circuit's decision, the result would not leave a jurisdictional void resulting in wrongs to this state or its citizens that would go uncompensated or unpunished. The Ute Indian Law and Order Code provides the courts of the Ute Indian Tribe with jurisdiction over civil and criminal matters occurring on the reservation and recognizes the jurisdiction of other forums where the Tribe does not have jurisdiction. *See* The Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah § 1-2-5. And we have spoken before of the need to recognize Indian tribes as sovereigns that are entitled to a presumption of legitimacy insofar as the exercise of their judicial power is concerned. *See In re Adoption of Holloway*, 732 P.2d 962, 968 (Utah 1986); *cf. Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48-49 (1989) (approving *Holloway*).

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[1] In footnote two of the court's opinion, the majority states that the Justice Department "failed to recognize that the Tenth Circuit's *en banc* decision in *Ute Indian Tribe* was in conflict with prior decisions of this [c]ourt." The majority then cites *Sowards v. Meagher*, 37 Utah 212, 108 P. 1112 (1910), and *White Rocks Irrigation Co. v. Mooseman*, 45 Utah 79, 141 P. 459 (1914). Yet as the majority itself recognizes, "it cannot be said, as a technical matter, that the *Sowards* opinion specifically addressed the question of whether the Reservation was disestablished as to the lands that were returned to the public domain." The same observation holds true for *White Rocks Irrigation Co.* Consequently, the implication of the majority opinion in footnote two – that this court has previously ruled on the issue at bar and that the majority opinion is, in part, following established precedent – is simply incorrect.



But even if there were some presumption that we should reexamine a federal court determination of the jurisdiction of Utah courts – a proposition neither the State nor the majority advances – the circumstances of this case are more than sufficient to show that such a redetermination is inappropriate. First, comity concerns are heightened here where we are asked to revisit issues of federal law, decided on defensible bases by coordinate federal courts,[2] for the sole purpose of creating a conflict with the federal courts to force Supreme Court review. "Comity between federal and state courts is necessary to prevent scandal from unseemly conflicts of jurisdiction and to promote a decent and orderly administration of justice." 21 C.J.S. *Courts* § 210 (1990). Instead of seeking to further the interests of comity-prevention of a direct jurisdictional clash and promotion of the uniform administration of justice – the majority's decision to reach and redecide the merits of the boundary question needlessly upsets a previously settled area of law and achieves the opposite effect. Today's decision encourages litigants to forum shop in the hope of inconsistent decisions, an ill

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[2] *See, e.g., Hall v. Nomura Securities Int'l*, 268 Cal. Rptr. 45, 49 (Ct. App.), *reh'g denied* (June 20, 1990); *Bouwman v. Department of Social Servs.*, 375 N.W.2d 806, 808 (Mich. Ct. App. 1985); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990); *Van De Hey v. United States Nat'l Bank of Oregon*, 793 P.2d 1388, 1390 (Or. Ct. App. 1990), *aff'd*, 313 Or. 86, ___ P.2d ___ (1992); *State v. Goodell*, 734 P.2d 10, 11-12 (Or. Ct. App.), *rev. denied*, 737 P.2d 1248 (Or. 1987). *See generally* Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 Colum. L. Rev. 943 (1948); Annotation, *Duty of State Courts to Follow Decisions of Federal Courts, Other Than the Supreme Court, on Federal Questions*, 147 A.L.R. 857 (1943).

comity seeks to avoid in the federal-state context.[3] *See Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990)

An additional reason for applying principles of comity is to recognize the unique role of federal law in regulating Indian lands and interests. Because of this unique role, "federal courts are the ultimate decision maker as to whether federal, state or tribal courts have jurisdiction in a particular Indian law case." *State v. Daly*, 454 N.W.2d 342, 344 (S.D. 1990). The primacy of federal authority in this area stems from at least three sources: the Constitution, the federal statute that admitted Utah to the Union, and the special relationship assumed by the federal government toward Indian tribes.

The Constitution makes the federal government supreme in dealings with Indian tribes. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). Section 8 of Article I gives the federal government power "[t]o regulate Commerce with foreign Nations, and among the

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[3] The application of comity principles in the federal-state context is not new to this state. On at least one occasion of which I am aware, this court has recognized the appropriateness of deferring to federal court interpretations of federal law. *See Kuchenmeister v. Los Angeles & S.L.R.R.*, 52 Utah 116, 122, 172 P. 725, 727 (1918); *cf. Antillon v. Department of Employment Sec.*, 688 P.2d 455, 457 (Utah 1984) (holding that state court must follow federal court decision construing analogous statute from another state where statutes were enacted as condition of continued federal approval of state unemployment compensation programs).



several states, and with the Indian tribes."[4] U.S. Const. art. I, § 8, cl. 3. This provision implicitly recognizes that Indian tribes are quasi-sovereign entities with *sui generis* status as "domestic dependent nations" under federal law. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1831). As an aspect of their inherent sovereignty, tribes exercise powers of self-government. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). In line with this grant of authority to the national government, state interference in the government-to-government relationship existing between the United States and Indian tribes is generally prohibited except to the extent that Congress has granted the state such authority. *See Worcester*, 31 U.S. (6 Pet.) at 561-62; Felix S. Cohen, *Handbook of Federal Indian Law* 259 (1982) [hereinafter Cohen].[5] This "'policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.'" *McClanahan v.*

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[4] The Treaty Clause, U.S. Const. art. II, § 2, and the Supremacy Clause, *id.* art. VI, cl. 2, are also often cited as sources of exclusive federal power in dealing with Indian tribes. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 207-12 (1982).

[5] I recognize that the United States Supreme Court's "more recent cases have recognized the rights of states, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands. . . ." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, ___ U.S. ___, ___, 112 S. Ct. 683, ___, 116 L. Ed. 2d 687, 697 (1992). However, absent congressional authorization, such state jurisdiction is clearly prohibited to the extent that it "'wouldinterfere [sic] with reservation self-government or impair a right granted or reserved [to the tribe] by federal law.'" *Id.* (quoting *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962)).

*Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olsen*, 324 U.S. 786, 789 (1945)). Recognition of this policy was a condition of Utah's admission to the Union. The Enabling Act states:

> [T]he people inhabiting said proposed State do agree that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .

Enabling Act, Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107. I recognize that we have concurrent authority with federal courts to construe federal statutes. However, the constitutional commitment of authority over Indian tribes to the federal government requires that we proceed with special care in cases affecting the tribes. And when a federal court has spoken directly on an issue of Indian law, this care should be transformed to an extreme reluctance to redecide the matter.

The federal government's trust responsibility to Indian tribes also bears on the question of whether we should honor comity principles in this case. Ever since Chief Justice Marshall described the relationship of the tribes to the United States as "that of a ward to his guardian," *Cherokee Nation*, 30 U.S. (1 Pet.) at 16, the trust relationship has been a cornerstone of federal Indian jurisprudence. Cohen at 221. Of similar importance is the well-recognized federal policy of supporting tribal self-



government and self-determination. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); Cohen at 349. The federal government's trust responsibility to the tribes and the federal policy supporting tribal self-government and self-determination provide a backdrop against which federal courts resolve Indian issues. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). And it is this perspective that underlies the rule that courts are to interpret statutory provisions affecting Indians in favor of the tribes. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Ute Indian Tribe*, 773 F.2d at 1089.[6]

Based on the foregoing considerations, I conclude that comity principles require deference to the Tenth Circuit's disposition of the boundary issue.

Following the course I suggest would not be novel. Several state courts have relied on comity principles in deferring to federal court decisions on Indian law questions. *See, e.g., Daly*, 454 N.W.2d at 344; *State v. Francis*, 563 A.2d 249, 253 (Vt. 1989). Indeed, the South Dakota Supreme Court has gone so far as to overrule one of its cases in recognition of a federal court of appeals' ruling

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[6] *See also National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (holding that policy of supporting tribal self-government and self determination favors rule that provides tribal courts the first opportunity to evaluate factual and legal bases for jurisdictional challenges); *Nance v. Environmental Protection Agency*, 645 F.2d 701, 710-11 (9th Cir.) (noting that "*any* Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes" (emphasis in original)), *cert. denied sub nom. Crow Tribe of Indians v. Environmental Protection Agency*, 454 U.S. 1081 (1981).

concerning South Dakota's jurisdiction over Indians living within the state. *State v. Spotted Horse*, 462 N.W.2d 463, 467 (S.C. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2041, 114 L. Ed. 2d 125 (1991). Similarly, the Oregon court of Appeals has overruled one of its prior decisions in order to defer to a federal court of appeals' ruling regarding a tribe's treaty right to fish. *State v. Goodell*, 734 P.2d 10, 11-12 (Or. Ct. App.), *rev. denied*, 737 P.2d 1248 (Or. 1987). Although these two courts did not expressly rely on comity principles in their holdings, I see no other obvious bases for the results they reached.

In short, there is well-established precedent for following comity principles in cases such as this.

As a final matter, I register my objection to the majority's treatment of the merits of the boundary issue. Were I to reach the issue, I would follow the exhaustive and thoroughly researched opinions of the federal courts, both trial and appellate. *See Ute Indian Tribe*, 773 F.2d 1087; *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072 (D. Utah 1981). They constitute an adequate remonstrance to the majority's disposition of the issue. Specifically, those decisions followed the approach dictated by the Supreme Court in determining whether the various enactments at issue demonstrated a congressional intent to diminish reservation boundaries. That court had said that, in the absence of "*substantial and compelling evidence* of a congressional intention to diminish Indian lands," the courts' "traditional solicitude for the Indian tribes" must compel a finding that "the old reservation boundaries survived the opening." *Solem v. Bartlett*, 465 U.S. 463, 472 (1984) (emphasis added) (quoted in *Ute Indian Tribe*, 773 F.2d at



1089); *accord Rosebud*, 430 U.S. at 586 ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." (Citation omitted)). The Tenth Circuit and the district court viewed the relevant statues [sic] with this perspective, *see* 773 F.2d at 1089; 521 F. Supp. at 1110 n. 118; a close reading of the majority decision here demonstrates that it does not.

There are times when I, as a state court judge, lament what might be fairly characterized as the second-guessing of our decisions by federal courts simply because they do not like a result we may have reached. *See, e.g., Lafferty v. Cook*, 949 F.2d 1546 (10th Cir. 1991) (disagreeing with *State v. Lafferty*, 749 P.2d 1239 (Utah 1988)) *cert. denied sub nom. Cook v. Lafferty*, 112 S. Ct. 1942 (1992). The present case puts that shoe on the other foot, an exercise that may be ironic, but is even less defensible. The federal government is, after all, supreme on questions that fall within its purview. In this situation, federal statutory law is at issue, the federal trust responsibility to the Indian tribe is at issue, and it was the federal courts that adjudicated the boundary question years ago. As of today, federal supremacy and Supreme Court review of this court's decision provides the only remaining hope for the Ute Tribe, one of those "weak and defenseless people who are the wards of the nation, [and who are] dependent upon its protection and good faith," *Rosebud*, 430 U.S. at 586, for what little is left of the patrimony they held before the whites came to this continent.

**United States Court of Appeals,
Tenth Circuit.**

**Nos. 81-1827, 81-1901.**

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The UTE INDIAN TRIBE,

*Plaintiff-Appellant and Cross-Appellee,*

v.

The STATE OF UTAH,

*Defendant-Appellee,*

**Duchesne County, a political subdivision of the State of Utah, Roosevelt City, a municipal corporation, Duchesne City, a municipal corporation, and Uintah County, a political subdivision of the State of Utah, Defendants-Appellees and Cross-Appellants.**

Before HOLLOWAY, Chief Judge, and SETH, DOYLE, BARRETT, McKAY, LOGAN and SEYMOUR, Circuit Judges.

**ON REHEARING EN BANC**

WILLIAM E. DOYLE, Circuit Judge.

The above entitled matter was considered by the court en banc on the motion for rehearing. The result was that the majority of the Judges decided that there should be reconsideration and a different result. It will be recalled that in the dissenting opinion which was written previously, this writer agreed with the position which has been taken by District Judge Jenkins (*Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072 (D.Utah 1981), who generally ruled that the Uintah Reservation and its lands



remain the property of the tribes that are involved. As to the questions whether the acts dealing with the Uintah Forest and the Uncompahgre Reservation mean that the Indians lost title to these lands, the view of this writer is contrary to the view of the trial court.

**I.**

**THE UINTAH ISSUE**

With respect to the case against disestablishment, it was even clearer in connection with the Uintah Indian Reservation than the other areas. The district court pointed out in its opinion that the Act of May 5, 1864, 13 Stat. 64, which established the Uintah Reservation provided that "the lands within the Uintah Reservation should be 'set apart for the permanent settlement and exclusive occupation of the Indians.' " 521 F.Supp. 1072 at 1111, quoting H.R.Rep. No. 660, 53d Cong., 2d Sess., 1-3 (1894). The Uintah Reservation was thus clearly established as a permanent home for the Ute Tribe. Considering that Congress' intent to establish and set aside the Uintah Reservation was clearly expressed, disestablishment of that reservation would require an equally clear expression of congressional intent to change the status of the reservation.

Recently the Supreme Court decision in *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), clarified that only in two types of situations should courts find that Congress intended to disestablish an Indian reservation. The first of these is when Congress uses explicit language of cession in an opening act and also

gives indication of an unconditional commitment to compensate Indians for their opened lands. 104 S.Ct. at 1166. The other situation is when "events surrounding the passage of a surplus land act, particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress – unequivocally reveal a widely-held contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation. . . ." *Id.* But neither the intent behind the Indian Appropriations Act of 1905, ch. 1479, 33 Stat. 1048, [hereinafter cited as 1905 Act] that allegedly diminished the Uintah Reservation, nor the language used in that Act, is sufficiently clear to support a finding that the Act disestablished or diminished the Uintah Reservation. Indeed the language used in that Act is sufficiently clear to support a finding that the Act did not disestablish or diminish the Uintah Reservation. Neither the language used in that Act nor any other aspect of it gives clear support for a finding that the Act disestablished or diminished the Uintah Reservation. Nor does the legislative history support the allegation approached.

The original opinion, 716 F.2d 1298, in this case inferred, from a series of laws passed between 1902 and 1905, that Congress intended to diminish the size of the Uintah Reservation. The opinion stated that Congress' intent in passing the Indian Appropriations Act of 1902, ch. 888, 32 Stat. 245, [hereinafter cited as 1902 Act] was to disestablish the Reservation and that its original intent carried through to the 1905 Act that actually opened the Reservation to non-Indian settlers. The object of this was certainly different from the conclusion that was set forth.



But we now conclude that no intention to alter the Reservation's boundaries was present. Actually the intent was to open the Reservation to non-Indian settlers and this couldn't effect the result that was suggested.

The district court's opinion was indeed well researched on this question, and others as well. The 1902 Act would have returned all surplus Uintah Reservation lands to the public domain if the Ute Tribe's consent could be obtained. That consent was never forthcoming. The Tribe refused all requests to give up their lands. As a result of the impasse, Congress passed additional legislation in 1903 and 1904 extending the time set for the opening of the Reservation. *See* Indian Appropriations Act of 1903, ch. 994, 32 Stat. 982, 997-98; Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-08. Finally, Congress passed the 1905 Act, opening the Reservation for non-Indian settlement under the homestead and townsite laws. This measure, which actually effected the opening of the reservation, did not contain the public domain language used in the 1902 Act.

It is not possible to find that the series of congressional enactments summarized above revealed a "baseline purpose of disestablishment," 716 F.2d at 1312, that carried through into the 1905 Act. To do so is inconsistent with the Supreme Court's longstanding directive, reiterated in *Solem*, that in the absence of "substantial and compelling evidence of a congressional intention to diminish Indian lands," the courts' "traditional solicitude for the Indian tribes" must compel a finding that "the old reservation boundaries survived the opening." 104 S.Ct. at 1167. It is impossible to draw disestablishment conclusions or inferences from these congressional statements.

An examination of the 1902-1905 series of Congressional enactments with the proper "solicitude for the Indian tribes," *Solem*, at 1167, provides inferences against diminishment. The district court's initial decision that the Uintah Reservation was not disestablished or diminished is correct. The strongest inference that is to be drawn from Congress' actions is that Congress wished surplus Uintah Reservation lands to be put to productive use. With respect to the Reservation's boundaries, the only inference that can be drawn is that Congress had no intention for them to change. Congress' use of "homestead and township acts" language in the 1905 Act, as contrasted with its use of "public domain" language in the 1902 Act, is evidence of a clear retreat from any desire to effect a wholesale diminishment of the Reservation.[1]

The original opinion's conclusion that the Uintah Reservation was diminished by the 1905 Act is not correct. Indeed we accept the district court's view that the Reservation's boundaries were not changed by the 1905 Act.

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[1] The brief submitted by the Cities and Counties suggests that the 1905 Act necessarily diminished the Uintah Reservation because BIA personnel and local residents immediately thereafter began referring to the "former" reservation. These contemporaneous interpretations of the Act are entitled to little weight. Congress' authority over reservations is plenary, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903), and it is Congress' intent that must govern our decision. The interpretation, wishful or not, given to the 1905 Act by whites living in the Reservation area cannot overcome the lack of compelling evidence that Congress intended to diminish the Uintah Reservation.



## II.

## THE FOREST RESERVE PROBLEM

We will next discuss the status of the 1,010,000 acres of the Uintah Forest Reserve, which was set aside under the authority of the 1905 Act. The Act provided:

> That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary.

33 Stat, at 1070.

There is nothing in the 1905 Act or in its legislative history which establishes a "total surrender of tribal interests" or a "widely-held contemporaneous understanding that the affected reservation would shrink," as required by *Solem*, 104 S.Ct. at 1166. The act merely authorized President Theodore Roosevelt to set apart reservation lands as a forest reserve. This he did. Proclamation of July 14, 1905, 34 Stat. 3113. Indeed the 1905 Act specifically reserved the Utes' timber interests in the lands by authorizing forest officials to sell as much timber as could be safely sold for fifteen years and to pay the money to the Utes. 33 Stat. at 1070.

There is clear evidence that Congress did not intend to extinguish the forest lands of the Uintah Reservation. That evidence is shown when the 1905 Act is contrasted with the Act of Apr. 4, 1910, ch. 140, 36 Stat. 269. The latter clearly extinguished a portion of the reservation lands for reclamation purposes. The reclamation lands

were originally set aside under the authority of the 1905 Act. This was in the same manner as the forest lands which had been set aside. Yet five years later Congress showed that it could be explicit when it dealt with the reclamation lands. It said: "All right, title and interest of the Indiana in the said lands are hereby extinguished, and control thereof shall pass to the owners of the lands irrigated from said project. . . . " 36 Stat. at 285. In contrast Congress never enacted a subsequent statute extinguishing the Utes' interests in the lands withdrawn for the forest reserve.

Also, when Congress compensated the Utes for 973,779 acres of the forest lands in 1931, it recognized the lands as "belonging to such Indians." Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092.

Despite the fact that neither the language of the 1905 Act nor its legislative history evidences congressional intent to remove the forest lands from the Uintah Reservation, the district court and this court in its original opinion concluded that the reservation had been diminished because withdrawal of lands for a forest reserve was inconsistent with continued reservation status. 521 F.Supp. at 1138; 716 F.2d 1314. In reaching this decision, both courts stressed that the administrative authority over the forest lands was transferred from the Department of the Interior to the Department of Agriculture. Such a change in the administration of the lands, however, does not rise to the level of a subsequent event



establishing clear congressional purpose to diminish, as required by *Solem,* 104 S.Ct. at 1166-67.[2]

We therefore conclude that the Uintah Reservation was not diminished by the withdrawal of the national forest lands.

## III.

## THE UNCOMPAHGRE RESERVATION

Following rehearing it became necessary to consider the status of the Uncompahgre Reservation in Utah. This is said to be the least popular of the group. The position which is taken by the district court and by this court in the earlier opinion was that the entire Uncompahgre Reservation had been disestablished. However, there is a lack of evidence of this fact unless there can be disestablishment by failure to develop the area. The State of Utah supports the district court's original decision. Under the *Solem* standards neither the Uncompahgre Reservation nor the Uintah Reservation has been disestablished or diminished by any of the Congressional enactments in question. It must be mentioned, however, that this is, for the most part, a very dry area whose highest value, in addition to agriculture, is its mineral deposits, such as gilsonite, etc. On this account, there is some interest on the part of development parties.

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[2] The applicable forest service laws mentioned in the 1905 Act are limited by 16 U.S.C. § 480, which provides that criminal and civil jurisdiction is not affected by the existence of a national forest. Thus, Indian jurisdiction does extend to Indians on forest lands.

It is interesting to note that there exists no clear expression of congressional intent to disestablish the affected areas, including this one, as contemplated by the court in *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

In *Solem* it was found that it was difficult to disestablish an Indian reservation. It went on to say Congress must "clearly evince" an intent to change boundaries before diminishment will be found. *Id.* The *Solem* test for determining whether tracts remain a reservation emphasizes this factor. The *Solem* court also stated that subsequent events such as demographic transformations of the area should be examined and regarded. However, subsequent events should be assessed to a "lesser extent" than the statutory language and surrounding circumstances. *Id.*

We now turn to apply these principles to the 1894 and 1897 Acts.

In 1894, bills were introduced providing "for opening the Uncompahgre and Uintah Reservations." H.R. 4511, 6557, 53d Cong. 2d Sess.(1894); see S.Rep. No. 450, 53d Cong., 2d Sess., 4027 (1894). It is to be noted that these bills were never enacted. However, the Indian Appropriations Act of 1894 included H.R. 6557, with changes. We first consider the 1894 Act's operative language, set forth below.[3]

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[3] Sec. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands according to the treaty of eighteen hundred and eighty, as follows: Allotments in severalty of said lands shall be made as follows: To each head of a family one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, with an additional quantity of graying law not exceeding one-eighth of a section; to each other person under eighteen years of age, born prior to such allotment, one-eighth of a section, with a like quantity of grazing land: *Provided*, That, with the consent of said commission, any adult Indian may select a less quantity of land, if more desirable on account of location: *And Provided*, That the said Indians shall pay one dollar and twenty-five cents per acre for said lands from the fund now in the United States Treasury realized from the sale of their lands in Colorado as provided by their contract with the Government. All necessary surveys, if any, to enable said commission to complete the allotments shall be made under the direction of the General Land Office. Said commissioners shall, as soon as practicable after their appointment, report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.

Sec. 21. That the remainder of the lands on said reservation, shall, upon the approval of the allotments by the Secretary of the Interior, be immediately open to entry under the homestead and mineral laws of the United States: *Provided*, That no person shall be entitled to locate more than two claims, neither to exceed ten acres, on any lands containing asphaltum, gilsonite, or like substances. *Provided*, That after three years actual and continuous residence upon agricultural lands from date of settlement the settler may, upon full payment of one dollar and fifty cents per acre, receive patent for the tract entered. If not



The 1897 statute which ultimately opened the Uncompahgre Reservation provided:

> The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.

We mentioned above that there is some interest due to the presence of minerals and it should be mentioned here that the land contains gilsonite and other minerals and unquestionably there is more interest in these features than in limited agricultural activites [sic] that have operated in the area.

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commuted at the end of three years the settler shall pay at the time of making final proof the sum of one dollar and fifty cents per acre.

Sec. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress.



The question as to whether the statutory language of the 1894 and 1897 acts disestablished the Uncompahgre Reservation calls for an interpretation based on historical research. This court's previous opinion concluded that the statutory language of the 1894 Act established a "baseline" purpose to disestablish which the 1897 Act executed. 716 F.2d at 1306. The opinion read the term "restore to public domain" in the 1894 Act as an indication of a clear congressional intent to remove the Uncompahgre land from the Indians. Our conclusion is that the phrase "restore to the public domain" is not the same as a congressional state of mind to disestablish. In other words, it doesn't disturb the ownership of the land by the tribal group. There are several competing meanings that could be implied from the phrase "restore to the public domain." But the most important one is that it permits the invasion of an area and purchase of land and general utilization. It is said that it is equally plausible that the phrase means that Indian lands would be available for settlement, but that the boundaries remain unchanged. The original expression "return to the public domain" does not reliably establish the clear and unequivocal evidence of Congress' intent to change boundaries. *Solem*, 104 S.Ct. at 1166.

Our reading of the statutory language of the 1894 and 1897 Acts indicates that there is no explicit language of cession, termination, or any other reference to "the present and total surrender of all tribal interests." *Id.* The provisions of these acts are in sharp contrast to the statutory language in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) where "termination" was found. *See also Mattz v. Arnett*, 412 U.S. 481, 504, 93

S.Ct. 2245, 2257, 37 L.Ed.2d 92 (1973). Secondly, we have not found any language which promises the Indians any certain sum for their lands as in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 591, 97 S.Ct. at 1365.

As in *Solem*, 104 S.Ct. at 1169, the references in the 1894 Act to being in "the public domain" and being "open to entry" do not present "an explicit expression of congressional intent to diminish" the Uncompahgre Reservation. We fully agree with this viewpoint.

The circumstances surrounding the passage of the Acts also fail to establish a clear congressional purpose to disestablish the Reservation. Our reading of the Act's objectives is that they merely opened lands to public entry and failed to extinguish the Reservation.

Our conclusions are first, that the opening of the Uncompahgre Reservation was never formally or informally negotiated between the federal government and the Tribe of Indians. There was never an understanding on the part of the Tribe that they would lose their reservation as a result of the 1897 Act. The Uncompahgres never bargained for the termination of the exterior boundary of their reservation. For example, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 584, 97 S.Ct. at 1361 and *DeCoteau v. District County Court*, 420 U.S. 425, 446, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975), the Court found formal negotiation between the tribes and the federal government which resulted in termination. Unlike these earlier cases, the Uncompahgre Indians had no understanding that they were losing their reservation in exchange for a specific benefit.



It is true that the other evidence as to "surrounding events" is ambiguous. The Cities and Counties cite newspaper articles from the period which refer to the Uncompahgre Reservation as the old or former reservation. No particular significance can be given to these articles since they were written from the white settlers' points of view. But these statements do not enjoy any official significance. *DeCoteau v. District County Court*, 420 U.S. at 443, n. 27, 95 S.Ct. at 1092, n. 27.

We agree with the Tribe that the restoration of vacant and undisposed lands in 1948 is suggestive of continued reservation status. *See Mattz v. Arnett*, 412 U.S. 481, 505-06, n. 25, 93 S.Ct. 2245, 2258 n. 25, 37 L.Ed.2d 92. The conclusion to be drawn is that the surrounding events concerning the 1894 and 1897 Acts are ambiguous. They provide no substantial and compelling evidence of a congressional intention to diminish Indian lands. *Solem*, 104 S.Ct. at 1167. The inconclusive nature of this evidence leads us to the conclusion of *Solem:* "We are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and the the [sic] old reservation boundaries survived the opening." *Id.* at 1167 (citations omitted). Therefore, we hold that the Uncompahgre Reservation has not been disestablished or diminished.

In summary, we conclude that there are no explicit references to boundary changes and disestablishment in the language of the 1894 or 1897 Acts. We also conclude that there is no evidence of a widely-held understanding on the part of the affected Tribe that the Uncompahgre Reservation would be disestablished.

## IV.

## CONCLUSION

In closing, we find no evidence, either explicit or implicit, in any congressional enactment that Congress intended to diminish or disestablish the Uncompahgre and Uintah Reservations. We reverse the district court holding insofar as it found the Uncompahgre Reservation disestablished and the Uintah Reservation diminished by the withdrawal of the forest lands. In all other respects we affirm the district court's decision.

SEYMOUR, Circuit Judge, with whom HOLLOWAY, Chief Judge, and McKAY and LOGAN, Circuit Judges, join, concurring.

I concur in Judge Doyle's opinion holding that Congress did not disestablish either the Uintah Reservation, in whole or in part, or the Uncompahgre Reservation. The views expressed by both Judge Doyle and the district court in *Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072 (D.Utah 1981), amply support this conclusion with respect to the Uintah Reservation as a whole. However, the district court held that Congress had extinguished that portion of the Uintah Reservation designated as a forest reserve, and all of the Uncompahgre Reservation. I write separately from Judge Doyle to amplify those points I find critical to his conclusion that the district court erred in this respect.



## I.

## UNCOMPAHGRE RESERVATION

The claim that Congress has never disestablished the Uncompahgre Reservation poses a difficult analytical problem. Although both the district court and the panel decided that the reservation had been disestablished, neither court had the advantage of evaluating the issue in light of *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). *Solem* is particularly helpful in this instance, and a review of its premises will assist our analysis.

*Solem* recognizes that Congress passed a number of surplus land acts at the turn of the century, in response both to pressure for new land and to the prevailing view that Indians should be assimilated into American society through transition to a private agrarian economy. *See Solem*, 104 S.Ct. at 1164. The land acts were intended to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement.[1] *Id.* Because each of these land acts was "the product of a unique set of tribal negotiation and legislative compromise," *id.*, each act must be construed

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[1] The General Allotment Act of 1887, ch. 119, 24 Stat. 388, gave the President discretion to allot reservation lands to resident Indians and, with tribal consent, to sell surplus lands. A transitional act, it maintained the reservation system but tried to facilitate the allotment process. The Act envisioned the abolition of the reservation system only after this process was complete. *See Mattz v. Arnett*, 412 U.S. 481, 496-97, 93 S.Ct. 2245, 2253-54, 37 L.Ed.2d 92 (1973). Congress later enacted specific legislation to assure the opening of a particular reservation. *Id.* at 497, 93 S.Ct. at 2254.

independently to determine whether it resulted in actual disestablishment or diminishment of a reservation.

This task is complicated by Congress' failure to distinguish between property interest, i.e., or title to the land in question, and reservation status. During the relevant period, ownership of the land and its assets provided the focus of congressional interest. *See, e.g.*, 30 Cong.Rec. 816-40 (1897) (LD 45.)[2] "Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries." *Solem*, 104 S.Ct. at 1165 (citing Act of June 25, 1948, ch. 645, § 1151, 62 Stat. 757 (codified at 18 U.S.C. § 1151)). Consequently, allotment in severalty to individual Indians and subsequent entry by non-Indians is entirely consistent with continued reservation status. *See Mattz v. Arnett*, 412 U.S. 481, 497, 93 S.Ct. 2245, 2254, 37 L.Ed.2d 92 (1973).

Moreover, at the turn of the century, members of Congress assumed that Indians would eventually be assimilated and the reservation system then dismantled. They were therefore less concerned with the effect of a statute on reservation boundaries than in opening the land to non-Indians. *Solem*, 104 S.Ct. at 1164-65. This expectation never came to pass, but it contributed to the

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[2] The record on appeal includes a Joint Compendium of Legislative Documents including Executive Orders, Presidential Proclamations, and certain Secretarial Orders, compiled and used by the district court. *See* Rec., vol. XI, XII. In addition to formal citation form, these sources are referred to parenthetically by their corresponding compendium index numbers, LD 1 to LD 217.



ambiguity of certain statutory language and the anticipated effect of that language. These considerations are essential in evaluating the Tribe's claim.

With this context in mind,[3] *Solem* directs us to look to the language of the particular act and the circumstances underlying its passage to determine whether Congress clearly evinced an intent to change boundaries. *Id.* at 1165-66. Appropriately, the most probative evidence of congressional intent is the statutory language used to open Indian lands. *Id.* at 1166. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* Explicit language of cession is not, however, a prerequisite for a finding of diminishment. When such language is missing, we must determine whether "events surrounding the passage of a surplus land act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress – *unequivocally* reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation. . . . " *Id.* (emphasis added).

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[3] *Solem* cautions that the Court has "never been willing to extrapolate from this expectation [of demise of the reservation system] a specific congressional purpose of diminishing reservations with the passage of every surplus land act." *Solem*, 104 S.Ct. at 1165. Nor will diminishment be "lightly inferred." *Id.* at 1166.

The first surplus land act which pertains to the Uncompahgres was adopted in 1894. *See* Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-38 (LD 35). The Act provided for allotment of land to the Indians for which they would be required to pay. The Act further provided that unallotted land, i.e., land considered either unsuitable or unnecessary for the Indians' needs, "shall, by proclamation, be restored to the public domain and made subject to entry [under the homestead and mineral laws of the United States]." *Id.*, § 20 at 337. Although the district court and the panel viewed this as language of cession, I believe that *Solem* dictates a different result. The act at issue in *Solem* used the term "public domain" in reference to the lands within the purported reservation, as well as the phrase "within the respective reservations thus diminished." *Solem*, 104 S.Ct. at 1168-69. The Court acknowledged that these isolated references might support a finding of diminishment, but found them "hardly dispositive" when balanced against the "stated and limited goal of opening up reservation lands for sale to non-Indian settlers." *Id.* at 1169. The Court further noted that there was "considerable doubt as to what Congress meant in using these phrases . . . [since] unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." *Id.* at 1169 n. 17 (citations omitted).

Ultimately, I interpret *Solem* to hold that "public domain" language standing alone is insufficient to support a finding of explicit congressional intent to disestablish. In the case before us the ambiguity of the term is only heightened by its subsequent exclusion from the 1897 Act. *See* Act of June 7, 1897, ch. 3, 30 Stat. 62 (LD 49).



Much of the text of the 1894 Act vanished in the 1897 Act, the act that actually succeeded in opening the reservation.[4] The operative phrase which used the term "public domain" was replaced by the following:

> "[A]ll the lands . . . not theretofore allotted in severalty to said Uncompahgre Utes shall . . . be *open for location and entry under all the land laws of the United States*; excepting . . . all lands containing gilsonite, asphalt, elaterite, or other like substances."

*Id.* at 87 (emphasis added). The panel and the district court equated this language with the earlier "public domain" language. Prior to *Solem*, "public domain" language could have been construed as more conclusive evidence of disestablishment; following *Solem*, the term must be viewed as ambiguous in portent, especially since the change in the 1897 Act reveals Congress' preoccupation with title to the opened lands. As *Mattz* reminds us, under these surplus land acts, allotment is entirely consistent with continued reservation status. *Mattz*, 412 U.S. at 497, 93 S.Ct. at 2254. More emphatically, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 104 S.Ct. at 1166. In this light, we cannot read the

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[4] The terms of the 1894 Act were never fulfilled and the effort to impose the Act on the Uncompahgres was dropped in 1896. *See* S.Doc. No. 32, 55th Cong., 1st Sess. 2 (1897) (LD 46). The 1897 Act is the critical one before us, and I can see no reason to infer a baseline purpose of disestablishment from the ambiguous terms of the unrealized 1894 Act.

operative language of the 1897 Act as an explicit indication of congressional intent to disestablish.

We must therefore consider whether events surrounding the passage of the Act "unequivocally reveal a widely-held, contemporaneous understanding" that the reservation boundaries would be extinguished. *See id.* The Supreme Court has found disestablishment in one case where explicit language of cession was missing. In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), the Rosebud Sioux Tribe voted in favor of an agreement to cede a portion of their reservation in exchange for a sum certain. Congress then passed a series of bills which incorporated the cession language but slightly altered the compensation provision. Although none of the acts clearly severed the Tribe's interest in the unallotted opened lands, the Court held that the statutory language read in conjunction with the agreement by the Tribe unequivocally demonstrated congressional intent to diminish. *Id.* at 587-88, 97 S.Ct. at 1363-64; *see also Solem*, 104 S.Ct. at 1165-66 n. 10.

We have no such agreement here. In fact, it is clear that the Uncompahgre Tribe vociferously opposed the terms of the 1894 Act, a fact which resulted in the failure of the allotment program. *See, e.g.*, S.Rep. No. 450, 53d Cong., 2d Sess. 1 (1894) ("they have from their long residence upon their present reservation acquired a conviction that the lands belong to them") (LD 27); H.R.Doc. No. 191, 54th Cong., 1st Sess. (1896) (Secretary of Interior response to order asking why the 1894 Act had not been implemented) (LD 39); S.Doc. 32, 55th Cong., 1st Sess. (1897) (relating fact that effort to allot pursuant to 1894



Act ceased in 1896) (LD46).[5] Therefore, other circumstances must unequivocally reveal an intent to disestablish before we can affirm the judgment of the district court.

Legislative reports make clear that Congress perceived no legal obligation to obtain the consent of the Uncompahgres, even though the Supreme Court had not yet decided that Congress could unilaterally disestablish a reservation without Indian consent. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). This is so because Congress had been informed that the Uncompahgres were entitled only to temporary occupancy of their reservation until land within the reservation could be allotted in severalty. *See, e.g.*, H.R.Rep. No. 1605, 51st Cong., 1st Sess. 2 (1890); H.R. Rep. No. 660, 53d Cong., 2d Sess. (1894) (LD 30).

The roots of this perception are not exactly clear. Before coming to Utah, the Uncompahgres had occupied a reservation in Colorado. In 1880, they were induced to cede their interest in that reservation and agreed

> "to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural

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[5] As did congressional debate, negotiations with the Indians focused on whether they would have to pay for their allotments. This requirement was eventually dropped, but the agreement to participate in the allotment program does not imply an understanding that the reservation boundaries would disappear.

lands as may be found in that vicinity and in the Territory of Utah."

Act of June 15, 1880, ch. 223, § 1, 21 Stat. 199, 200 (LD 11). The Act authorized the President to appoint a commission to identify eligible Indians and allot to them land in severalty within the prescribed areas. *Id.*, § 2 at 202-203. The Act further directed the Secretary of the Interior to identify "a sufficient quantity of land in the vicinities named . . . , to secure the settlement in severalty of said Indians. . . . " *Id.*, § 3 at 203. Once the Secretary had done so, and the allotment process had been completed, the Act contemplated that "all the lands not so allotted, the title to which is [by this agreement] released and conveyed to the United States, shall be held and deemed to be public lands. . . . " *Id.* Finally, the Act provided that the Indians holding allotments would be subject to the civil and criminal laws of the state or territory in which they resided "with the right to sue and be sued in the courts thereof." *Id.*, § 4 at 204.

Had nothing been done between the date of this agreement and the 1897 Act, it is arguable that the Uncompahgres might have had no *jurisdictional* rights or boundaries. *Compare* F. Cohen, *Handbook of Federal Indian Law*, ch. 1, § D3a, at 34-41 (1982) (indicating definition of Indian country under 18 U.S.C. § 1151 (1982) may not include unrestricted allotted land) *with id.*, ch. 9, § A3a, at 499 (reservation may be established without formal executive order if administrative action reveals purpose of inducing a tribe to settle in a designated area and subsequent treatment as a reservation). However, two years later, on January 5, 1882, President Arthur established the Uncompahgre Reservation by an Executive Order. (LD



12). Nothing in the 1880 Act required him to do so; in fact, the Secretary and the Commissioner had been empowered to designate appropriate land for allotment. He may have felt obligated to create the reservation simply because no land was "found" or "available" to the Uncompahgres in Colorado. Instead, the Tribe was forced to settle in a barren region of Utah no one else yet wanted, where there were, at most, 10,000 acres of arable land out of the nearly two million acre reservation. Although the 1880 Act spoke only in terms of title to land, the subsequent Executive Order indisputably created jurisdictional rights for the Uncompahgres. It is well settled that a reservation created by executive order had the identical legal status as one created by Congress. *See Mattz*, 412 U.S. at 492-94, S.Ct. at 2251-53. Moreover, since title and reservation status are not congruent concepts, the 1882 Executive Order in no way interfered with Congress' intent that the Uncompahgres hold no title to the land.[6] It merely provided a reservation within which, until the allotment process was complete, the Uncompahgres had temporary occupancy of the whole.[7]

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[6] The order did withhold the land from sale, presumably to permit the completion of the allotment process. The 1894 and 1897 Acts would have been needed in any event to reopen the land for sale to non-Indians. It became clear that the legislation was necessary to spur the stalled allotment process. By the 1890s, Congress was also under pressure to open the land to permit mining interests to enter.

[7] The fact that the Uncompahgres did not own the land within their reservation explains why members of Congress and others considered the Uncompahgres to be in a different position that the Uintahs, who did hold title to the land within their reservation. It also explains why the United States did not have

Following allotment, the lands could be and were opened to public purchase and settlement. Any unallotted land would then be returned to the United States, leaving only individual tribal members with allotments in severalty. *See* Act of June 15, 1880, § 3 (LD 11). But in my view it is clear that this title arrangement did not undermine the jurisdictional boundaries created by the 1882 Executive Order. The end result was an Indian reservation where the Indians held title to their allotted parcels and the remainder of the land was opened to the public.

This analysis is supported by the focus on mineral deposits during congressional debates over the 1897 Act. *See Ute Indian Tribe*, 521 F.Supp. at 1104; *see generally* 30 Cong.Rec. 102-08, 712-20, 725, 814-21, 826-33, 1070, 1110-20, 1130, 1208-11, 1245, 1253, 1468 (1897) (LD 45). The reservation was recognized as practically barren and valuable only for its extensive deposits of gilsonite, a mineral previously monopolized by foreign producers. Congress was deeply concerned with providing access to these minerals while preventing monopolization by a few mining interests; hence the provision in both the 1894 And 1897 Acts limiting the number of claims any person could post. Congress was also confused as to the exact nature of the Uncompahgres' interest in the land, as indicated by the remarks of Representative Maguire of California in 1897:

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to pay the Uncompahgres for the land subsequently opened to the public. That the Uncompahgres only had temporary occupancy rights within the reservation before they received their allotments, however, does not undermine their claim that the jurisdictional boundaries were never extinguished, given the distinction between title and jurisdiction.



"Gentlemen say here that these gilsonite deposits are of no value, but the Government experts report that they are of immense value, and the struggle to secure them through the medium of this amendment shows that they are so regarded by the representatives of private interest. I do not care which statement may be true. If the deposits in question be a great body of valuable public property belonging to the citizens of the United States, we ought not to give them away in the manner proposed. If as the gentlemen from Colorado [Rep. Shafroth] has stated, they have no value, then we ought not to disturb the Indians who are now using the lands in which they lie. They should be permitted to use the land as long as it serves their purposes; certainly until another reservation shall be found for them.

It is urged on the one hand that the Indians have title to or at least a vested interest in these lands, and on the other it is denied that they have any such title or interest. Respectable legal opinions have been cited on both sides, showing at least that the question is not free from doubt. Are we, upon ex parte and hasty statements of law and fact, to arbitrarily decide this question against the unrepresented Indians, and drive them ruthlessly from this reservation, without even the suggestion that we will not or hereafter provide them with another?"

30 Cong.Rec. at 828-29 (LD 45).

These remarks once again reveal Congress' preoccupation with title as well as its general confusion regarding the nature of the Uncompahgres' rights in the reservation. Given such ambiguous circumstances, it is impossible to

derive any clear indication of whether Congress intended merely to open the reservation or to disestablish it. Under *Solem*, we are bound to resolve this ambiguity in favor of the Tribe. Judge Jenkins, in his thoughtful opinion, correctly pointed out the lack of congressional statements indicating that the Uncompahgre Reservation was intended to survive the opening, 521 F.Supp. at 1107, but he applied the wrong test in inferring disestablishment from this fact. Explicit congressional intent to alter reservation boundaries must be affirmatively shown.

> "When both an act and its legislative history fail to provide *substantial and compelling evidence of a congressional intention to diminish* Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening."

*Solem*, 104 S.Ct. at 1167 (emphasis added).

Undeniably, Congress could be explicit when it chose to be. *See Mattz*, 412 U.S. At 504-505 & n. 22, 93 S.Ct. at 2257-2258 & n. 22. Congress was completely clear when it terminated Uintah rights in the Gilsonite Strip, *see* Act of May 24, 1888, ch. 310 § 1, 25 Stat. 157 (LD 18), and the Strawberry Reservoir Project lands, *see* Act of April 4, 1910, ch. 140, § 23, 36 Stat. 269, 285 (LD 139); *see also* Act of June 15, 1880, § 1, 21 Stat. 199, 200 (LD 11) (ceding the Ute Colorado lands to the United States). However, no explicit language of cession can be found in either the 1894 or 1897 Acts or in their legislative history. Moreover, surrounding circumstances do not indicate a widely-held contemporaneous understanding that the *reservation*



*boundaries* would disappear, as opposed to a transfer of the title to the lands. I believe that this is so because Congress truly was not concerned about the implications for the Indians of continued reservation status, because it anticipated the future demise of the reservation system and envisioned no influx of white settlers to that barren region. *See Solem*, 104 S.Ct. at 1164-65. Instead, Congress was concerned solely with title and access to the unique mineral deposits found there.

In addition, the subsequent history of the region does not compel a finding of disestablishment. Few people, Indian or non-Indian, live there today. The character of the area has not changed to such an extent that the reservation has de facto disappeared. *See id.* at 1167. Finally, although *Solem* accords subsequent treatment of the area by the federal government and local authorities "some evidentiary value," *id.*, these later events are not dispositive of congressional intent at the time of opening. Had such events resulted in a dramatic change in the character of a region, they would weigh more heavily. However, the one event that seems irreconcilable with continued reservation status, the 1948 Hill Creek Extension, *see* Act of March 11, 1948, ch. 108, 62 Stat. 72 (LD 187), in no way changed the character of the region. In fact, it preserved its Indian character. Absent such a change, Congress' action fifty years following the opening of the reservation does not alter my previous conclusion.

Accordingly, given the ambiguity of the statutes, congressional confusion concerning the nature of Indian rights within the reservation and how the legislation would affect whose rights, the lack of an agreement with

the Uncompahgres concerning cession of their interests, and the lack of change in the character of the land, I believe that Congress never clearly evinced an intention to disestablish the Uncompahgre Reservation boundaries and the the evidence supporting such a conclusion is neither substantial nor compelling.

## II.

## THE FOREST RESERVE

These same principles support the conclusion that the forest reserve remains within the boundaries of the Uintah Reservation. The 1905 Act provides as follows:

> "That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest reserves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary."

Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1070 (LD 105). Assuming the Uintah Reservation was never disestablished, nothing in this paragraph amounts to explicit language of cession or a total surrender of Indian interests. The Act merely contemplated the opening of the reservation to non-Indians and permitted the United States to reserve those lands it wished to withhold from settlement.

I find nothing in this action inconsistent with continued tribal jurisdiction within the forest reserve, even though the laws governing national forests are comprehensive. In 1897, when Congress set forth some of the



details of its policy for management of National Forests, *see* 30 Stat. 34-36, it left room for the limited exercise of jurisdiction by the state in which the forest is located. *See* 30 Stat. 36 (1897) (codified at 16 U.S.C. § 480).[8] Thus it is clear that the goals of the national forest system as of 1905, including protection of the watershed, protection of fish and game, and management of timber resources, *see, e.g.,* 30 Stat. 35 (1897); 33 Stat. 872-73 (1905), could be achieved without taking jurisdiction away from Indian Tribes. Consistent with this analysis, the United States has supported the Tribe's claim to the forest reserve throughout this litigation.

This tribal jurisdiction is limited by federal resource management policy. The U.S. Forest Service and other ederal [sic] agencies such as the U.S. Fish and Wildlife Service participate in managing the land and resources of a national forest. Because these agencies are arms of the United States entitled to sovereign immunity from the Tribe's dictates, the Tribe has no more authority to interfere with federal management of the Uintah forest reserve as a national forest than would the State of Utah. Federal agencies may choose to incorporate tribal or state laws for fishing, hunting, or the like, or they may preempt

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[8] 16 U.S.C. § (1982) provides:

"The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence . . . ; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State."

these laws by promulgating regulations designed to further federal land management policy.

As a practical matter, therefore, Indian tribal jurisdiction over the forest reserve will permit the Tribe to govern its members, but will not greatly affect non-Indians. National forest land that is on an Indian reservation is similar to land that is privately held within a reservation; it is not "land belonging to the Tribe or held by the United States in trust for the Tribe." *Montana v. United States*, 450 U.S. 544, 557, 101 S.Ct. 1245, 1254, 67 L.Ed. 2 (1981). The Tribe's power to exercise civil authority over non-Indians on such land covers only conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 101 S.Ct. at 1258.

As Judge Doyle points out, Congress sought to protect Indian interests in the forest lands so reserved and managed. The 1905 Act authorized forest officials to sell as much timber as could be safely harvested and to pay the money to the Utes for fifteen years. The provision only indicates Congress' assumption that the reservation system would be dismantled in the near future. Since we have construed the 1905 Act to open rather than disestablish the Uintah Reservation, this provision does not indicate a present congressional intent to terminate Uintah interests in the forest reserve; indeed, it preserves them. Moreover, Congress recognized that this provision was insufficient to terminate all Indian rights in the land. This fact is indicated by comparing Congress' treatment of a reservoir site in the same Act. The Act authorized the President to "set apart and reserve any reservoir site or other lands necessary to conserve and protect the water



supply for the Indians or for general agricultural development." 33 Stat. 1070. The President did so on August 3, 1905. However, Indian rights were actually terminated only when Congress passed a second statute providing that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished. . . . " Act of April 4, 1910, ch. 140, § 23, 36 Stat. 269, 285 (creating the Strawberry Reservoir Project) (LD 139). In contrast, Congress never specifically terminated Indian interest in the forest reserve lands.

In finding diminishment, the district court expressed concern that the presidential proclamation reserving the forest lands, *see* Proclamation of July 14, 1905, 34 Stat. 3116 (LD 107), was made pursuant to a general act authorizing the President to set apart, "*public land* bearing forests . . . as *public reservations*" Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (LD 25) (emphasis added). In light of the earlier discussion of the implications of public domain language under *Solem*, I cannot see that this language alters my analysis. Congress was opening the reservation to public entry, and the United States was exercising its right to choose first from available land. The United States eventually paid for most of the land it had reserved, *see* Act of February 13, 1931, ch. 124, 46 Stat. 1092 (LD 167), and returned the remaining portion to Ute ownership, *see* Act of July 14, 1956, ch. 603, 70 Stat. 546 (LD 203). Since, as established above, such an exchange of title cannot affect reservation status, the term "public reservation" does not require us to conclude that Congress withdrew the forest reserve from the Uintah Reservation.

Nor does the fact that Congress once created a specifically Indian forest reserve compel such a conclusion. In that instance, Congress deferred to Indian management of the forest lands. Here Congress intended the lands to be federally *managed* as part of the existing Uintah Forest Reserve. As noted above, in light of 16 U.S.C. § 480, I see no conflict between federal management of forest land and continued reservation status.

Finally, I am not persuaded by the panel's reliance on *United States v. Gemmill*, 535 F.2d 1145 (9th Cir.), *cert. denied*, 429 U.S. 982, 97 S.Ct. 496, 50 L.Ed.2d 591 (1976), and *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 206 Ct.Cl. 649 (1975). In those cases, creation of a forest reserve was only one of several factors indicating the unambiguous extinguishment of Indian rights.

In sum, I would affirm the district court insofar as it holds that the Uintah Reservation was not disestablished. I would reserve the district court insofar as it holds that the portion of the Uintah Reservation reserved as a forest and the Uncompahgre Reservation were disestablished.

SETH, Circuit Judge, dissenting.

I must respectfully dissent.

These appeals concern the continued existence of the Uncompahgre and Uintah Indian reservations. The Ute Tribe in Utah fashioned a Law and Order Code which purported to exercise jurisdiction over all the lands within the original Uintah reservation created by executive order in 1861 as well as the Uncompahgre Indian reservation created in 1882, both in Utah. The State of Utah and several Utah counties and cities questioned



tribal jurisdiction over much of this land arguing that a great deal of the Uintah reservation and the whole of the Uncompahgre reservation had been disestablished and was no longer "Indian Country." (18 U.S.C. § 1151.)

This Ute Tribe (the Uintah, White River and Uncompahgre bands) brought suit for declaratory judgment and injunctive relief, requesting that the present extent of the reservations and of tribal jurisdiction be determined. The trial court heard extensive testimony and performed an exhaustive study of legislative and administrative materials relating to the history of both the Uintah and Uncompahgre reservations. The transcript and the record comprise several thousand pages.

As to the Uintah reservation the trial court decided that the original reservation had been changed by several Acts of Congress directed to particular tracts. Thus Congress had removed a 7,040-acre tract known as the Gilsonite Strip in 1888, had removed 1,010,000 acres of land for National Forest purposes in 1905, and had also withdrawn 56,000 acres of land for a reclamation project in 1910. In 1948 the Uintah reservation was increased by 510,000 acres by the addition of the Hill Creek Extension. Except for these specific Acts of Congress, the trial court held that all lands within the original boundaries of the Uintah reservation remained "Indian Country." The individual allotments to Indians, the public law entries by others and some mineral locations were recognized. These were, however, within the exterior boundaries of the reservation.

The trial court concluded that the Uncompahgre reservation ahd been disestablished.

The resolution of a dispute such as this involving Indian reservations turns on what Congress intended to accomplish at the time as a legal matter. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *see Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). The conclusions of the trial court on this point are persuasive, but are not considered to be findings of fact.

The method of examining legislative history and determining legislative intent in cases concerning Indian reservations had been addressed by the United States Supreme Court in recent times. Four such cases are especially significant to our problem. *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), was decided in 1962 and concerned the Colville Indian reservation. The Court held that the North half of the reservation had been disestablished, but the South half remained in reservation status. The Act of Congress said to have disestablished the North half declared that it should be "vacated and restored to the public domain." 27 Stat. 62, 63. The relevant acts with regard to the South half of the reservation allotted the land pursuant to the Congressional policy expressed in the General Allotment Act of 1887, 24 Stat. 390, but did not contain language of vacation and restoration or the term "public domain." *Seymour*, at 355, 82 S.Ct. at 427. The Court also mentioned subsequent legislative and administrative history of the South half of the reservation to support its conclusion that it was still a reservation. On these grounds the Court held that the South half of the reservation retained its status as Indian Country.



In *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973), decided in 1973, the Court held that the Klamath River reservation had not been disestablished. The Court made it clear that the allotment of lands within the reservation to resident Indians was consistent with reservation status and an opening for settlement in addition did not disestablish. Thus a more explicit indication of Congressional intent was necessary to disestablish. However, the Court did not rest its decision on the fact that the unequivocal language of vacation and restoration to the public domain that had been present in *Seymour* was absent in *Mattz*. Clearly the Court was unwilling to suggest that there were any special recitations the absence of which would mean that a reservation continued. In addition to considering the historical background of the reservation and the legislative history, the Court observed that several bills which contained clear language of disestablishment passed the House of Representatives but did not pass in the Senate. The Court interpreted the repeated failure of those bills as a sign of Congressional intent that the reservation continue. Thus the crucial point was not simply that the final Allotment Act for the Klamath River reservation lacked language of disestablishment, but that Congress had never at any state permitted such language to be passed into law. It is important that in *Mattz* the Court stated that an opening of a reservation for settlement did not necessarily disestablish the reservation. This was referred to in the *Rosebud* opinion hereinafter considered. The settlement by Indians and non-Indians was considered to be of benefit to the Indians.

The Court in *Mattz* discussed the subsequent jurisdictional history of the reservation as an illustration for its holding of continued reservation status rather than as a foundation for that holding. No detailed analysis of legislative intent was undertaken at the time of the Acts said to constitute disestablishment for any of these cases.

*DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), raised the question of whether the Lake Traverse Indian reservation survived a restoration to the public domain. The Court held that it did not, based also on the express Indian cession of the land. This feature of the *DeCoteau* case has no application to the case at bar but *DeCoteau* is important as to the significance of the phrase "public domain." The Court, in comparing the legislation there in question to other Indian agreements, stated, at 446, 95 S.Ct. at 1094:

> "That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.' "

The Court speaks as if a restoration to the public domain settled the matter of disestablishment. The position of the two phrases suggests that "returned to the public domain" is synonymous with "stripped of reservation status." With regard to the question of jurisdictional history, the fact that the State of South Dakota had exercised virtually undisputed jurisdiction over the land was important to the Court's decision.



*Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), is of overriding importance to the determination of the case before us because it is the most recent Supreme Court case on the subject and because it provides a detailed analysis. The facts of *Rosebud* are similar to those of other disestablishment cases. The language on which the Court relies in finding disestablishment of the reservation in *Rosebud* does *not* contain a phrase analogous or similar to "vacated and restored to the public domain" of *Seymour*. *Rosebud* involved unilateral action by Congress rather than cession by the Indians. *Rosebud* lays out what the Court terms some "well-established legal principles." One of these is the general rule that doubtful expressions are to be resolved in favor of the Indians. The Court cautions that the resolution of doubt in favor of the Indians is not to be done by ignoring clear indications of Congressional intent, nor does this method of resolving doubt intrude on the Court's holding in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903).

The Supreme Court in *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), considered the Cheyenne River Act of May 29, 1908. The Act authorized the Secretary to *sell* portions of the reservation within a described area with the proceeds to go to the benefit of the Indians. The opinion considers the older cases herein referred to but only decided the consequences of the Act authorizing sales. It does not provide direction as to our problem.

In *Lone Wolf* the Court held that Congress possessed the authority to abrogate unilaterally the provisions of an

Indian treaty. This eliminated the notion that Congressional action with regard to an Indian reservation nvolved [sic] some sort of implied contract. After *Lone Wolf* in 1903 established that Congress could act unilaterally toward Indian lands and reservations, the only relevant inquiry became Congressional intent. This prevailed in *Rosebud* where the Congressional action under discussion was the ratification of an agreement with the Indians. It is significant to our problem that the Court in *Rosebud* held that a beneficial interest retained in the lands opened does not preserve to the reservation its original size and shape.

The guiding consideration in *Rosebud* is, of course, the determination of Congressional intent. The Court said this in *Rosebud*:

> "In all cases, 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was."

Before turning to the application of these considerations, it is important to note one feature of the *Rosebud* analysis. In *Mattz v. Arnett*, as discussed above, the Court rejected the contention that bills passed in one House of Congress but not the other, could be an indicator of Congressional intent. *Rosebud* gives a contrary signal as Congress had ailed to ratify a 1901 agreement which would have disestablished the reservation but ratified a similar agreement in 1904. The Court observed that the 1901 agreement would unquestionably have changed the reservation boundaries had it been ratified. The 1904 ratification the Court stated evinced a continuity of purpose and language with the 1901 attempt. Therefore, the



1901 agreement even though not ratified demonstrated "an unmistakable baseline purpose of disestablishment." *Rosebud*, 430 U.S. at 592, 97 S.Ct. at 1366. This line of reasoning modifies *Mattz* in explaining techniques of determining Congressional intent. Under *Rosebud*, if the language of an rlier [sic] bill is sufficiently unequivocal, and a later Act can be shown to have accomplished the intended purpose of the first, then the first gains validity as an indicator of Congressional intent even though it did not pass both Houses. This analysis has important application in the case at bar.

In *Rosebud*, as in *DeCoteau*, the assumption of state jurisdiction for many years before the suit arose was clear. All the same, the Court does not rely heavily on that history, but mentions it only after having arrived at a conclusion of disestablishment on the basis of legislative history and statutory construction.

It is clear from the above cases that the controlling factors are, of course, terms of the Act with legislative intent, but we are cautioned against relying on particular statutory language. However, a phrase such as "vacated and restored to the public domain" seems to be a sufficient though not a necessary factor in disestablishment. *Compare DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), with *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). *DeCoteau* implies that language restoring the reservation to the "public domain" may be enough to constitute disestablishment. The subsequent legislative and administrative history is sometimes used to support an interpretation of an Act. Finally, considerations of

jurisdictional history and contemporary opinion on reservation status seem to be relied upon only where they are unequivocal. More often, they are discussed to demonstrate that they are not necessarily contrary to the conclusion already reached on the basis of statutory language and history.

In determining legislative intent it is necessary to consider the legislation in its historical context and not as if it were passed today. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). *Mattz* refers to the "surrounding circumstances." Thus a study of the purpose of any legislation involving the Indians would be incomplete and inaccurate without a consideration of the then prevailing policy on the subject. It is apparent that such policy does not follow an unwavering line, and may not appear in a very obvious way. However, in the case before us there was a very clear and drastic policy change which was put into operation throughout the West in all the larger Indian reservations. This was the General Allotment Act of 1887, 24 Stat. 390. This expressed the policy of replacing the reservations with allotments of a tract of land to each Indian to be owned individually. This was known at the Dawes Act and was introduced by Senatory Dawes of Massachusetts. He had been active in groups seeking to improve the life of the Indians.

The Secretary of Interior commented when it was pending as a bill and said in part that it would:

> "inspire the Indians with a feeling of assurance as to the permanency of their ownership of the lands they occupy and cultivate; it will give them a clear and legal standing as landed proprietors in the courts of law; it will secure to them for the first time fixed homes under the protection of the same law under which white men hold theirs; it will eventually open to settlement by white men the large tracts of land now belonging to the reservations but not used by the Indians. It will thus put the relations between the Indians and their white neighbors in the Western country upon a new basis, by gradually doing away with the system of large reservations, which has so frequently provoked those encroachment which in the past have led to so much cruel injustice and so many disastrous collisions."



Report of the Secretary of the Interior, 1880, in serial 1959, pp. 5-6, 12.

Senator Dawes understood the Act to have as its goal the abolition of the reservation system. In addressing the Fifth Annual Meeting of the Lake Mohawk Conference of the Friends of the Indian, Senator Dawes stated:

> "Suppose these Indians become citizens of the United States with this 160 acres of land to their sole use, what becomes of the Indian Reservations, what becomes of the Indian Bureau, what becomes of all this machinery, what becomes of the six commissioners appointed for life? Their occupation is gone; they have all vanished, the work for which they have been created . . . is all gone. . . . You are not mending this fabric, you are taking it down stone by stone. . . . "

Minutes of the Lake Mohawk Conference, 1887, pp. 12-13.

Thus in the period between 1897 and 1905 when legislation opening the Uncompahgre and Uintah reservations was passed, the policy embodied by the Dawes Act was in full force and being implemented. "Friends of the Indians" wished to abolish the reservations out of a genuine conviction that such an abolition would contribute to the Indians' welfare. Concurrently with Senator Dawes but separately there were present in a myriad of forms the forces of expansion always seeking the development of the West and especially seeking more land in the West. These forces were likewise effective in Congress at the time here concerned.

We cannot be here influenced by what Congress might have done. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). We must instead decide what Congress in fact did. "[O]ur task here is a narrow one. . . . [We] cannot remake history." *DeCoteau v. District County Court*, 420 U.S. 425, at 449, 95 S.Ct. 1082, at 1095, 43 L.Ed.2d 300 (1975).

The Utes argue that the original Uintah and Uncompahgre reservations exist to their original extent except as to a few relatively small tracts. The two reservations when created contained some 4,000,000 acres. In 1905, when Congress was considering legislation concerning the reservations, there were about 1,440 Utes in the three bands. There are now about 1,500 enrolled members of the tribe. Nearly all of these live on the trust lands (that is on allotments and tracts reserved for tribal use). Federal programs and services appear to be available to all regardless of the outcome of this case.



Under the decision of the trial court the non-Indian towns of Duchesne and Roosevelt are within what were considered to be the reservation boundaries. About 90 percent of the population of a reservation so constituted would live in these towns. Most of the lands opened for settlement are in Duchesne County. About 300 Indians live there, but all are not members of the tribe. No one challenges the Indians' claim to the tracts for grazing set apart for the Indians and, of course, to the allotments made to individual Indians (about 360,000 acres) nor to the lands restored in the 1940's to the Indians (some 217,000 acres) nor to the Hill Creek Extension of about 500,000 acres. The basic dispute is to the non-Indian owned portions of the original reservations, and the National Forest portion.

Before the present dispute the trust land, the reserves and the allotments were referred to as the "Ute reservation" or the "Uintah reservation," and this explains the occasional use of the terms when additions were made extending the reservation or extending the reservation boundaries.

## I. THE UNCOMPAHGRE RESERVATION

The Uncompahgre reservation when established contained about 3,000 square miles and was apparently never occupied by more than several hundred Utes at any time. Most of them by 1905 had moved to the Uintah reservation, and they had taken allotments on that reservation rather than on the Uncompahgre.

In determining the status of the Uncompahgre reservation I am chiefly concerned with two pieces of legislation. The first is part of the Indian Appropriations Act of 1894, which contains this language:

> "Sec. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the territory of Utah, agricultural and grazing lands. . . . Said commissioners shall . . . report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.
>
> . . . .
>
> "Sec. 22. That said commission shall alsó negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress."

Act of August 15, 1894, ch. 20, 28 Stat. 286, 337-338.



This Act directs the Secretary to immediately open the unallotted lands, after approval of the allotments to entry. The land reported as unsuitable shall "thereupon" be restored to public domain by proclamation. The use of the then universally recognized term "public domain" in designating the eventual status of the land is of critical importance. The status of "public domain" there demonstrates an intent to disestablish. *See DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). Land to be in the "public domain" is inconsistent with reservation status or any particular use status. When public land is designated to be used for a particular purpose the land no longer remains in the "public domain." *Scott v. Carew*, 196 U.S. 100, 25 S.Ct. 193, 49 L.Ed. 403 (1905); *Wilcox v. Jackson*, 13 Pet. 498, 10 L.Ed. 264 (1839). Thus the creation of an Indian reservation or a forest or other particular use from public land removes it from the public domain. *Missouri, Kansas and Texas Ry. Co. v. Roberts*, 152 U.S. 114, 14 S.Ct. 496, 38 L.Ed. 377 (1894); *Leavenworth, Lawrence and Galveston Railroad Co. v. United States*, 92 U.S. 733, 2 Otto 733, 23 L.Ed. 634 (1875). The "public domain" is a well-recognized description of the status of the land. It was probably more generally recognized at the time the acts in issue were passed than it is now. It is clear that the creation of an Indian reservation from "public lands" removes the subject lands from the public domain. The return of particular use lands to the public domain involves similar land status concepts, and "public domain" then must have the same meaning as it did before. In *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43

L.Ed.2d 300 (1975), the Court held that public domain status and reservation status are mutually exclusive.

Another feature of the 1894 Act is the presence of limitations on "entry" when the land is opened. The Tribe argues with respect to the Uintah reservation that limitations on entry demonstrate that Congress did not intend full public domain status for the land. The opening of the Uncompahgre reservation disproves this theory both in the 1894 Act and in the legislative history of that Act. On the face of the 1894 Act the term "public domain" appears simultaneously with provisions limiting entry. Clearly, Congress did not consider these two things to be inconsistent. The legislative history shows that the purpose of the limitation to homestead and townsite entry was not to permit the Indians to retain control of the land, but was to prevent land speculation. Congress gave a great deal of time and care to trying to prevent the land from being snapped up by speculators. 53 Cong.Rec. 7684 (1894); 53 Cong.Rec. 7258-59 (1894). At no time during these debates was there any discussion to suggest a continuing claim by the Indians. Rather the House debated whether the Indians would be required to pay for their allotted lands, implying that Indian title to the reservation was not secure even in 1894 without some payment. 53 Cong. Rec. 7258 (1894). The proper analysis is that once land has been again placed in the public domain it is open and free to the application of the public land laws. Congress may then make limitations on entry and location, but these do not change the status of the land.

A final note about the 1894 Act is that it provides that the commission appointed to allot to the Uncompahgres should also attempt to procure the agreement of the



Uintah Indians to the relinquishment of their land. Thus as early as 1894, Congress contemplated the allotment and opening of the Uintah reservation. It is difficult to escape the impression that Congress hoped and sought to have allotments made to all the Indians as individuals, and to open the land in the reservations not so allotted under the public land laws.

Thus the 1894 Act, although it did not accomplish the opening of the reservation, persuasively indicates by the use of the term "public domain" that it was Congress' intent to remove this land from the Indian reservation. The power of this phrase is not weakened by any limitations on methods of entry to the land. I therefore conclude that this piece of legislation may be sufficient to demonstrate a "baseline" purpose to disestablish that later legislation carried through. The commission appointed by the 1894 Act failed in its efforts to make allotments to the Uncompahgres and was disbanded in 1896.

In 1897, Congress enacted a provision which made the allotment and opening of the Uncompahgre reservation mandatory. Thus:

> "The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompagre Ute Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah Reservation or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on or after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United

> States, excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances."

Act of June 7, 1897, ch. 3, 30 Stat. 62, 87.

The analogy to *Rosebud* which I have pursued here is not exact. The 1894 Act was in fact passed by both Houses of Congress, but its execution was not accomplished as we have seen. As an instrument of disestablishment it did not itself mandate the *actual opening* of the reservation, but the lands were to be restored to the public domain. When the lands became public domain they thereby were available under the public land laws to entry and location in the usual manner for all public lands. The "opening" and details for making entries were included in other acts to provide some organization to the expected rush to make entries. Thus the drawings here and at *Rosebud* were provided much like the simultaneous filings of today. Several hundred thousand people appeared for the Sioux drawings.

As the trial court observed, legislative and administrative history supports the conclusion that the Uncompahgre reservation was disestablished. The commission attempted to make allotments *after* the opening date of the 1897 Act as if the land was on a reservation. The Commissioner of Indian Affairs was unsure of the legality of this, as the lands were now in the "public domain." Rept. of the Comm. of Ind.Aff., 1898, JX 108, in H.Doc. No. 5, 55th Cong. 3d Sess. In the next few years, there were concerns that even these allotments might fail, and the Indian agent suggested that these Indians abandon the lands for lands on the Uintah reservation. *See* Letter from Acting Agent Mercer to Comm. of Ind.Aff. of Sept.



9, 1903, JX 174; Letter from Agency Clerk to the Agent of Aug. 31, 1903, JX 173; Letter from the Comm. of Ind.Aff. to Acting Agent Mercer of July 28, 1903, JX 170. Finally, by 1929, the Bureau of Indian Affairs seems clearly to have taken the position that the Uncompahgre reservation no longer existed. *See* Statement Concerning the Uncompahgre Grazing Reserve, Feb. 6, 1943, JX 451; Memorandum Relating to the Proposed Withdrawal of Certain Lands for Uncompahgre Ute Indians, Office of Indian Affairs; 1931, JX 426.

A final point illustrates both that "public domain" language was intended to apply through the 1897 Act to the Uncompahgres and that Congress, at least to some extent, considered the Uncompahgres and the Uintahs together when making law concerning the Indian reservation in Southern Utah. In the 1897 Act, it is expressly provided that the Uncompahgres may be given allotments on Uintah land. In 1902, in dealing with the Uintah reservation Congress again explicitly provided that the Uncompahgres be given allotments on Uintah land. 32 Stat. 245. This 1902 Uintah Act also contained "public domain" language. I do not rely on these connections, but they do provide some indicators of Congressional actions and intentions with regard to the Ute Tribe.

I understand Congress to have intended, and did disestablish the Uncompahgre reservation as concluded by the trial court.

## II. THE UINTAH RESERVATION

An Indian reservation was established by President Lincoln in 1861 to encompass the entire valley of the

Uintah River within the Utah Territory. This was at the time the Government was attempting to have the Utes of Colorado and New Mexico and others settle in designated areas. The reservation was thus for any Indian. Congress confirmed the reservation in 1864 (13 Stat. 63). This in part said:

> "Sec. 2. *And be it further enacted,* That the superintendent of Indian affairs for the territory of Utah be, and he is hereby, authorized and required to collect and settle all or so many of the Indians of said territory as may be found practicable in the Uinta valley, in said territory, which is hereby set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." (Emphasis in original.)

The reservation contained about 3,186 square miles or 2,039,040 acres, and may have been established for many more Indians than those who "were induced to inhabit the same."

In the half century following the establishment of the reservation Congress enacted several laws which the counties and cities claim altered substantially the status of the lands initially encompassed within it. The Utes claim the entire reservation as initially created save for two small diminishments, and claim that the legislation did not affect their rights. The counties and cities claim that the legislation enacted between 1888 and 1905 diminished the original reservation by withdrawing acreage on several occasions: to enable mining in the area known as the Gilsonite Strip; to enlarge the Uintah National Forest; and to create an irrigation project along the Strawberry



River. The counties and cities also claim that the Acts of Congress in 1902 and in 1905 directed that allotments of lands in the reservation be made to individual Indians and provided that all lands not allotted were restored to the public domain, and thereby were no longer a part of the reservation.

### *The Gilsonite Strip Withdrawal*

The first of the Acts of Congress was directed to a 7,000-acre tract in the reservation. In 1886 a prospector had located mining claims on the Uintah reservation for the mineral gilsonite. The land in question was not then being used by the Indians for agricultural or grazing purposes. Congress in 1888 passes an Act which mandated that the 7,040-acre "Gilsonite Strip" be "declared to be public lands of the United States and restored to the public domain." Act of May 24, 1888, ch. 310, 25 Stat. 157. The Act directed the Secretary of the Interior to procure the approval of a three-fourths majority of the adult male Indians, and to sell the land. Approval was secured and some sales made. The proceeds were credited to the Utes. The trial court found, and the parties do not dispute on appeal, that the Gilsonite Strip was removed from the reservation. I agree with this conclusion. The 1888 Act contained a significant restriction on the manner of entry after the lands were restored to the public domain. Thus the lands were to be sold in lots not exceeding one-quarter section in size. The parties do not dispute that this limitation on the manner of the disposition did not affect its removal from the reservation and restored it to the "public domain."

*Unallotted Lands*

During the 1890's and thereafter there was increasing pressure on Congress and the President to open parts of most of the large Indian reservations in the West to settlement by non-Indians, and also to have the Indians own individual tracts of land for their own betterment. I have mentioned these two movements in this opinion. The literature of the time and the court opinions refer to these as the "familiar forces."

The familiar forces thus sought to remove parts of the Uintah Valley reservation from reservation status and so to permit individual ownership by the Indians and to open it for settlement and mining. Thus in this context, with the recognized policy evidenced by the General Allotment Act, and the opening of other reservations, the Uintah Valley reservation was not an isolated instance where the "familiar forces" brought about changes. The people seeking the changes as a betterment for the Indians were sincere in their views. Many public figures advocated individual ownership by Indians, as indeed did a majority in the Congress and the President. The General Allotment Act must be taken as one example and is a clear and definite expression of the policy. Directions to carry it out were included in many pieces of legislation. This was the dominant feeling and policy of the time, the time when the legislation herein considered was passed. Its intent and purpose must be determined in that context, and not as the policies may now exist. Thus Congress in 1888 (25 Stat. 157) declared that a described portion of the Uintah Valley reservation "is hereby declared to be public lands of the United States and restored to the public domain." The Act provided that the



restoration be effective upon ratification by three-fourths of the Indians on the reservation. This ratification was not obtained.

Congress also had commissions appointed to negotiate allotments and cessions of the Uncompahgre and Uintah reservation in 1894, 1897 and 1898.

Then on May 27, 1902 Congress included as part of the Indian appropriations bill a direction that allotments be made to all adult White River and Uintah Utes. This included a provision restoring any unallotted lands of the 1864 Uintah reservation to the "public domain." Act of May 27, 1902, 32 Stat. 245, 263. The provision, in pertinent part, is as follows:

> "That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain."

The term "public domain" was used twice more in the later portions of the Act. This was one of several connected acts about which this dispute is centered and the references to "public domain" status for the lands not allotted to individual Indians are very significant to the arguments of the parties and to the position taken by the

trial court. Congress thereafter used appropriation acts in 1903, 1904 and 1905 to extend the time for opening and to insert added provisions. This was a series of acts with no express words in amendment and with express repeal of relatively small elements in the prior acts.

The trial court reasoned that the Supreme Court's holding in *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), compelled a finding that the language of the 1902 Act providing that all of the unallotted lands "shall be restored to the public domain" would have disestablished the reservation had the unallotted lands then been opened for settlement. The trial court reasoned, however, that this 1902 Act was so changed by a 1905 enactment that such a result did not come about.

The Utes attempt to distinguish *Seymour* by arguing that this 1902 Act may restore the unallotted lands to the public domain, but there is also needed a provision that the lands be vacated by the tribe before the lands are restored to the public domain. They argue that the cases uniformly provide the *independent* language to indicate that the reservation boundaries would be extinguished or adjusted at the same time that public entry was allowed is necessary to disestablish. They cite *DeCoteau v. District County Court*, 420 U.S. 425, 445-46, 95 S.Ct. 1082, 1093-94, 43 L.Ed.2d 300 (1975) (the express language of cession and relinquishment of reservation lands restored them to the public domain); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) (Act of March 2, 1889, § 21, 25 Stat. 896, created six separate reservations from the Great Sioux reservation and "all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public



domain," 25 Stat. at 896); *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) ("vacated and restored to the public domain"); *Starr v. Long Jim*, 227 U.S. 613, 33 S.Ct. 358, 57 L.Ed. 670 (1913) (Secretary of the Interior to cause the quantity of land allowed Indians remaining on the reservation to be selected in as compact a form as possible, the remainder to be restored to the public domain, Act of July 4, 1884, 23 Stat. 76); *Russ v. Wilkins*, 624 F.2d 914 (9th Cir. 1980) (explicit description of new reservation boundaries, the remainder "restored to the public lands of the United States," 17 Stat. at 634). These cited cases, as indicated by the notes, are however a mixture of statutory provisions, and do not stand for a proposition that a provision vacating the reservation or describing new boundaries is required for disestablishment.

The argument that the operative language of restoration must contain independent language adjusting or extinguishing reservation boundaries is unpersuasive. The Supreme Court has never mentioned such a requirement, *see, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), and I see no reason to impose one now. The trial court was correct in determining that the 1902 Act would have accomplished the disestablishment of the reservation as to unallotted lands had the lands been then opened. An additional factor relative to the 1902 Act was an addition to it providing for a tract of grazing land to be set apart for the common use of the Indians to meet the reasonable need of the Indians. This provision was added by a joint

resolution on June 19, 1902 (32 Stat. 744). It in part provided:

> "In addition to the allotment in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock."

This addition is significant in evaluating the 1902 Act and further demonstrates the status of the reservation lands before the opening.

*After the 1902 Act*

The Indian consent required by the 1902 Act was not forthcoming within the time limit to make the allotments, and Congress had to take further action. However, the matter was influenced in a very substantial way by the decision of the Supreme Court in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903), decided January 5, 1903. The Court there held that Congress could unilaterally change Indian reservations; that no tribal or Indian consent was required; and that there was no contractual relationship between the Government and the tribe arising from the establishment of a reservation. As is apparent, this had significant implications on what Congress was trying to accomplish as to this reservation and as to others.



In another appropriation act Congress by the Act of March 3, 1903 (32 Stat. 982) again extended the time for opening the unallotted lands for entry as provided in the 1902 Act, and eliminated any reference to consent of the Indians.

In 1904, Congress again extended in an appropriation act the time for the opening to March 10, 1905 so that surveying could be completed and allotments made. Act of April 21, 1904, 33 Stat. 189, 207.

The trial court held, and the parties do not dispute on appeal, that the 1903 and 1904 Acts did not affect the operative terms of the 1902 Act. I agree.

The time set by the 1904 Act for allotments to be completed (March 10, 1905) was running out and Congress again used an appropriation act to extend the time. However, there were added this time some new provisions by this Act of March 3, 1905 (33 Stat. 1048). There were provided more details as to the opening of the unallotted lands for entry, and restrictions were added as well which were of significance.

This 1905 Act in part provided:

> "That the said unallotted lands, excepting such tracts as many have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner

in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof;

"That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided*, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation." (Emphasis in original.)

*The Relationship of the 1902 and 1905 Acts*

This court considered the relationship of the various enactments concerning the Uintah reservation and certain issues regarding the status of the unallotted lands in *Hanson v. United States*, 153 F.2d 162 (10th Cir.). We there concluded that the issue had to be decided under the 1902 Act, and that the 1905 Act merely extended the date of opening of the reservation and did not affect the operative terms of the 1902 Act.



What is advanced as "limitations" on disposition in the 1905 Act is the provision that the unallotted lands were to be disposed of under "the general provisions of the homestead and town-site laws, . . . and shall be opened to settlement and entry by proclamation of the President." The 1905 Act does not specifically utilize or repeat the "public domain" language of the 1902 Act.

The provision that the lands be opened under the homestead and townsite laws does not constitute a substantial restriction which militates against the conclusion that the public domain intent in the 1902 Act was carried over into the 1905 Act. The limitation in the *Rosebud* opening is comparable as is *Starr v. Long Jim*, 227 U.S. 613, 33 S.Ct. 358, 57 L.Ed. 670 (1913). The provisions considered in *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973), and in *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), do not lead to a contrary conclusion. In the case before us the provisions in the prior acts dictated the public domain conclusion under the 1905 Act.

Nothing in the Congressional debates suggests an attempt to change the 1902 intent. *See* 39 Cong.Rec. 1181-85, January 21, 1905. Rather, Congress was concerned in 1905 with the possibility that land speculators would deprive actual homeseekers of the choicest land. "Indian Appropriations Bill, 1906," Hearings, Subcomm. of the Sen. Comm. of Ind. Aff., 58th Cong., 3d Sess. (1905).

The intent of the 1905 Act was thus to effect the restoration of the unallotted lands to the public domain

and to allow entry under the homestead and townsite laws to prevent speculation.

Evidence of this intent can be found in the Committee Report to S. 6867 in 1905, a bill which used language virtually identical to that found in the 1905 Act. There the report included letters from the Commissioner of Indian Affairs and from the Commissioner of the General Land Office which referred to the lands as being in the public domain or as public lands. S.Rep. No. 4240, 58th Cong., 3d Sess. (1905).

It is difficult to accept the argument that limitations on the manner of entry necessarily vitiate Congressional intent to disestablish the reservation in view of the Gilsonite Strip withdrawal herein considered. There, some 7,000 acres were restored to the public domain subject to a limitation on disposition to purchase with a maximum number of acres. As I have noted, neither party disputes that the strip was removed from reservation status. Thus limitations on entry are not necessarily inconsistent with the disestablishment. As mentioned in the *Rosebud* opinion Congress knew what operative words were needed to accomplish the purpose.

As mentioned, the changes were accomplished by a series of provisions contained in Indian appropriation acts of 1902, 1903, 1904 and 1905. Each act built on the ones before, and especially by "extending" the time for opening from those provided before. This shows a continuous process brought about by the delays encountered on the ground. The acts also did not seek to expressly amend the prior act but, as mentioned, built on the one before. This prevails as to matters other than time "extentions."



There were several express repeals, but only as to specific elements which were not of significance. Thus there were no general repeals but only additions of items here of concern. This cumulative series of enactments should be compared to the position taken by the Supreme Court in *Rosebud*, as I have already mentioned. There an agreement that failed to be ratified by Congress in 1901 could be considered in determining the intent of a 1904 Act. The 1904 Act or agreement indicated continuity of purpose and language with the 1901 attempt. The 1901 agreement showed "an unmistakable baseline purpose of disestablishment." *Rosebud*, at 592, 97 S.Ct. at 1366. This same demonstration of continuity is present in the case before us and the 1902 Act does also show a "baseline purpose of disestablishment." Again, the persuasiveness is greater here because the earlier language was in acts that passed both Houses and not in bills that failed.

Even if it were not clear from the terms of the 1905 Act and its legislative history that the 1905 Act was not intended to affect the substantive terms of the 1902 Act, 39 Cong.Rec. 3868, 3919, 39 Cong.Rec. 1181-83, the contemporaneous and subsequent legislative and administrative treatment of the unallotted lands confirms that they were part of the public domain.

The most important indication of the effect of the 1905 Act is President Roosevelt's Proclamation of July 14, 1905 which stated, in relevant part:

> "Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, 'shall be

restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre'.

"And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:

. . . .

"Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States. . . . "

Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3119.

The lands were to be opened by a presidential proclamation, and of great significance in any determination of the intent of Congress is the executive implementation of



the legislation. The proclamation is very similar in all significant respects to the *Rosebud* proclamation. This proclamation, with its references and adoption of terms from the 1902 Act, in my view demonstrates the continuation of the 1902 provisions, and confirms the public domain status of the unallotted lands. The proclamation is "an unambiguous, contemporaneous, statement, by the Nation's Chief Executive, of a perceived disestablishment" of the reservation. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 602-03, 97 S.Ct at 1371-72.

A further indication that the unallotted lands were no longer part of the reservation after it was opened is the subsequent restoration of some of those lands to reservation status for the Utes. Much if not all of the unallotted lands on the original Uintah reservation which had not been disposed of under the public land laws were restored in 1945. The Order of Restoration recites that "pursuant to the provisions of the act of May 27, 1902 (32 Stat. 263)" the unallotted lands were made subject to disposal under the laws applying to public lands. As indicated this restoration acknowledges that the opening was under the 1902 Act. Section 3 of the Reorganization Act provides that the Secretary of the Interior is authorized "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened." Act of June 18, 1934, 73rd Cong., 2d Sess., § 3. Neither party disputes that the restorations accomplished pursuant to § 463 of 25 U.S.C. made them part of the reservation. I agree. This restoration included about 217,000 acres.

Much later administrative treatment of the unallotted lands also confirms the proposition that those lands were

restored to the public domain. *See, e.g.*, Opinion of the Solicitor of the Department of the Interior, January 27, 1947, 59 I.D. 393 (unallotted lands were "restored to the public domain pursuant to the Act of May 27, 1902, as amended. . . . Although the lands were restored to the public domain, they were subject to disposition only under the Act of May 27, 1902, as amended." *Id.* at 393, 394); Letter from the Commissioner of Indian Affairs to the Secretary of the Interior, June 19, 1941.

The largest single addition occurred in 1948 when Congress added the Hill Creek Extension of some 510,000 acres of the former Uncompahgre reservation to the Uintah and Ouray reservation. Act of March 11, 1948, ch. 108, 62 Stat. 72.

I have also examined the maps introduced by the parties and the governmental statistics setting forth the acreage of the reservation and find them to support the position taken by the counties and cities. Statements made by the Utes themselves also tend to detract from their position. For example, the 1957 Ute Ten Year Development Program provides a description of the total acreage of the Uintah and Ouray reservation as currently containing 1,010,000 acres. In detail, it delineates, "The original area of the Uintah Reservation in Wasatch, Duchesne and Uintah Counties were reduced as follows. . . . " (The document then details the Gilsonite Strip reduction, the 1905 addition to the Uintah Forest Reserve, the Strawberry River reduction, the 1902 grazing reserve and allotments to individual Indians and "[a]pproximately 798,877 acres were disposed of by the United States for cash, or otherwise set aside and taken for its own use at various times since the opening of the reservation in 1905.") The



statistics of the Office of Indian Affairs show similar figures.

Both parties have introduced substantial evidence regarding administrative and legislative appellations to the "current" or "former" status of the reservation. My review of those references evinces no discernible Congressional intent one way or the other. There is simply no consistent, clear and uniform identification of the reservation's status in the subsequent legislative record. Analysis of the newspaper accountings of the events occurring on the reservation is similarly opaque.

Thus, after closely examining the record as it relates to the unallotted lands, I must conclude that the trial court erred in holding that the unallotted lands were not returned to the public domain pursuant to the 1902 Act.

*Other Issues – Pre-opening Withdrawals*
*Forest Reserve Lands*

Besides extending the time of entry under the 1902 Act and describing the entry thereunder, the 1905 Act also provided that before the opening the President was authorized to set apart and reserve lands in the reservation as an addition to the Uintah Forest Reserve. 33 Stat. 1070. Specifically, the Act states:

> "That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest reserves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary. . . . "

By proclamation, President Theodore Roosevelt withdrew 1,010,000 acres from the Uintah reservation for that purpose. Proclamation of July 14, 1905, 34 Stat. pt. 3, 3116. The reserve was created pursuant to specific authority under the 1905 Act and the general authority he already had.

The trial court found that the presidential forest reserve proclamation extinguished those portions of the reservation included therein. On appeal, the Utes argue that the statutory language of the 1905 Act and the contemporaneous legislative history did not extinguish the reservation boundaries nor did Congress ever enact subsequent legislation to extinguish the Utes' title. In the proclamation creating the forest reserve out of the reservation lands it was expressly provided that the reserve be an addition to the Uintah Forest Reserve which theretofore existed. The addition was to be "subject to the laws, rules, and regulations governing forest reserves."

My review of the 1905 Act, the presidential proclamation, the pertinent legislative history and the subsequent treatment of the subject lands convinces me that the forest reserve lands are not part of the reservation. No express language of termination of Indian jurisdiction over the Forest Service lands or an express extinguishment of the reservation boundaries was required. As I noted previously the Supreme Court has held that the "clear language of express termination" is not a required talisman for termination or disestablishment. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n. 4, 97 S.Ct. 1361, 1364 n. 4, 51 L.Ed.2d 660 (1977). The authority was present and was exercised to so change the land status from



reservation lands to public forest reserves. The administrative authority over the lands was transferred from the Secretary of the Interior to the Secretary of Agriculture pursuant to the Act of February 1, 1905, ch. 288, 33 Stat. 628, and subjected the Forest Service lands to an entirely different regulatory regime. By transferring of reservation status to the status of the Forest Service lands thus for public use and by shifting the administrative authority over them, Congressional intent to remove the lands from the reservation is clearly evidenced.

My view that Indian jurisdiction is inconsistent with the land's status as forest reserve land is consonant with recent holdings by the Court of Claims and the Ninth Circuit. Both courts held that the designation of land as a forest reserve is itself effective to extinguish Indian title. *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1386, 1391-93, 206 Ct.Cl. 649 (1975); *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976). The Ninth Circuit went on to find that "any ambiguity about extinguishment that may have remained after the establishment of the forest reserves, has been decisively resolved by congressional payment of compensation to the . . . Indians for these lands." *Id.* at 1149. The Utes received $1,217,000.00 in compensation. The situation before us is very similar as Congress added to a forest reserve by removing lands from an Indian reservation and later compensating the Indians for the lands. The trial court was correct in finding that the 1,010,000 acres withdrawn pursuant to the July 14, 1905 presidential proclamation were no longer part of the Uintah reservation.

*The Strawberry River Reclamation*

The third major part of the 1905 Act authorized the President before the reservation was opened to "set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development." President Roosevelt withheld from disposal 56,000 acres along the Strawberry River for reclamation purposes pursuant to that authority in August 1905. Presidential Proclamation of August 3, 1905, 34 Stat. pt. 3, 3141.

Five years later, Congress compensated the Utes for the Strawberry River lands and clearly extinguished any Indian interest in the lands by providing that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished, and the title, management and control thereof shall pass to the owners of the lands irrigated from said project. . . . " Act of April 4, 1910, 36 Stat. 269, 285.

Neither side disputes the trial court's holding that the reservation was diminished to the extent of the 56,000-acre Strawberry River withdrawal.

The withdrawal of lands for the Strawberry River irrigation project does not give rise to any implication that the unallotted lands remained part of the reservation. The Strawberry River lands were set apart and reserved on August 3, 1905, over three weeks *prior* to the opening of the reservation on August 28, 1905. Affirmative action to remove the Strawberry River lands from the reservation was then necessary because the reservation



had not yet been opened. The Strawberry River withdrawal has no bearing on the status of lands which were subsequently to be opened to the public domain.

I must repeat that these issues must be considered in the context of the aims of Congress at the time the legislation was enacted, and what was *then* sought to be accomplished. It is easy to apply later views and policies, but this should not be done. The then prevailing aims and purposes are well documented in the legislative history, and we should not now seek to apply current standards. Also, the application of then established public land law and the prevailing use and meaning of its terms are essential.

## CONCLUSION

I would:

1. Affirm the trial court's holding that the original Uncompahgre reservation was disestablished by Congress pursuant to the Act of June 7, 1897 and no longer exists.

2. Affirm the trial court's holding that prior to August 28, 1905, the original boundaries of the Uintah Valley Indian reservation were diminished by Congress through the withdrawal of the Gilsonite Strip in 1888, by the withdrawal of 1,010,000 acres subsequently made part of the Uintah National Forest, and by the withdrawal of approximately 56,000 acres for the Strawberry River irrigation project.

3. Affirm the trial court's finding that the 510,000-acre Hill Creek Extension was incorporated within the Uintah and Ouray Indian reservation.

As to the Uintah Valley reservation, I would reverse the holding of the trial court that the unallotted lands at the opening remained part of the reservation. Instead it is my view that the then unallotted lands lost all reservation status, became part of the public domain, and were not within the reservation for any purpose when the reservation was opened, subject only to the special tracts herein discussed set apart for specific uses before the land was opened, and subject to valid mineral claims specifically provided for in the Acts of 1902, 1903, 1904 and 1905 and valid claims made under the general mining laws.

BARRETT, Circuit Judge, joins in this dissenting opinion.

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**Congressional Acts and Presidential Proclamations**

**9.Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-264, I Kapp. 750, 753 (2d ed. 1904), LD 82:**

That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further*, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the

lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

Said item of seventy thousand and sixty-four dollars and forty-eight cents to be paid to the Uintah and White River Utes covers claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and for which the Government has received from said Uncompahgre Indians money aggregating sixty thousand and sixty thousand and sixty-four dollars and forty-eight cents; and the remaining ten thousand dollars claimed by the Indians under an Act of Congress detaching a small part of the reservation on the east and under which Act the proceeds of the sale of the lands were to be applied for the benefit of the Indians.

* * *



**10.Joint Resolution of June 19, 1902, No. 31, 32 Stat. 744, I Kapp. 799-800 (2d ed. 1904), LD 85:**

[No. 31.] Joint Resolution Supplementing and modifying certain provisions of the Indian appropriation Act for the year ending June thirtieth, nineteen hundred and three.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions of the Act "Making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes," are hereby supplemented and modified as follows:

The Secretary of the Interior is directed to make allotments in severalty to the Indians of the Spokane Indian Reservation in the State of Washington, and upon the completion of such allotments the President shall by proclamation give public notice thereof, whereupon the lands in said reservation not allotted to Indians or used or reserved by the Government, or occupied for school purposes, shall be opened to exploration, location, occupation, and purchase under the mining laws.

In addition to the allotment in severalty of lands in the Walker River Indian Reservation in the State of Nevada, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will

subserve the reasonable requirements of said Indians for the grazing of live stock.

In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to each head of a family and forty acres to each other Indian, and no more. The grazing land selected and set apart as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named.

Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eight, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and other general Acts amendatory thereof or supplemental thereto, and shall be subject to



all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

Approved, June 19, 1902.

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**11.Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-998, III Kapp. 14, 17-18 (1913), LD 91:**

To enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the purpose of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Walker River Reservation in Nevada, and the Uintah and White River Utes in Utah, and the joint resolution of June nineteenth, nineteen hundred and two, providing for the allotment of the Indians of Spokane Reservation in Washington, to be immediately available, one hundred and seventy-five thousand dollars: *Provided, however,* That

the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act: *And provided further*, That the grazing lands to be set apart for the use of the Uintah, White River Utes, and ther other Indians, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not exceed two hundred and fifty thousand acres: *And provided further*, That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May twenty-seventh, nineteen hundred and two, be, and the same is hereby, extended to October first, nineteen hundred and four.

That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, or other like substances, which were reserved from location, and entry by provision in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June seventh, eighteen hundred and ninety-seven, all discoveries and locations of



any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in the office of the county recorder of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral land laws, provided that the owners of such locations shall relocate their respective claims and record the same in the office of the county recorder of Uintah County, Utah, within ninety days after the passage of this act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms and with such restrictions as may be prescribed in a proclamation of the President of the United States issued for that purpose not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress.

* * *

**12.Act of April 21, 1904, Ch. 1402, 33 Stat. 189, 207-208, III Kapp. 35, 53 (1913), LD 94:**

That the time for opening the unallotted lands to public entry on the Uintah Reservation, in Utah, as provided by the acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, be, and the same is hereby, extended to March tenth, nineteen hundred and five, and five thousand dollars is hereby appropriated to enable the Secretary of the Interior to do the necessary surveying, and otherwise carry out the purposes of so much of the act of May twenty-seventh, nineteen hundred and two, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year nineteen hundred and three, and for other purposes, as provides for the allotment of the Indians of the Uintah and White River Utes in Utah.

* * *

**13.Act of March 3, 1905, ch. 1479, 33 Stat, 1048, 1069-1070, III Kapp. 124, 146-147 (1913), LD 105:**

That so much of the act of March third, nineteen hundred and three, as provides that the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.



That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *And provided further*, That all lands opened to

settlement and entry under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the act of Congress of May twenty-seventh, nineteen hundred and two, and the acts amendatory thereof and supplemental thereto.

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided*, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.[1]

That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in the office of the Secretary of the Interior, in the city of Washington,



said description and a map showing the locations made by it on the Uintah Reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two (Statutes at Large, volume thirty-two, page two hundred and sixty-three); and thereupon the Secretary of the Interior shall forthwith cause such locations to be inspected and report made, and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each of said claims: *Provided further*, That the Florence Mining Company entitled under the act of Congress approved May twenty-seventh, nineteen hundred and two, to the preferential right to locate not to exceed six hundred and forty acres of contiguous mineral land in the Uintah Reservation, Utah, shall within sixty days from the passage of this act file in the office of the recorder of deeds of the county in which its location is made a proper description of its claim, and it shall within the same time file in the office of the Secretary of the Interior said description and a map showing the location made by it on the Uintah Reservation, Utah, and thereupon the Secretary of the Interior shall forthwith cause said location to be inspected and report thereon made, and if found not to exceed six hundred and forty acres he shall issue a patent in fee to said company for the said land: *And provided further*, That the extension of time for opening the unallotted lands to public entry herein granted shall not extend the time to make locations to any person or company heretofore given a preferential right, but the Raven

Mining Company and the Florence Mining Company pending the time for opening to public entry the Uintah Reservation shall have the right of ingress and egress to and from their respective properties over and through said reservations.

* * *

**14.Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3116, III Kapp. 602 (1913), LD 107:**

**BY THE PRESIDENT OF THE UNITED STATES OF AMERICA**

**A PROCLAMATION.**

WHEREAS, the Uintah Forest Reserve, in the State of Utah, was established by proclamation dated February twenty-second, eighteen hundred and ninety-seven, under and by virtue of section twenty-four of the Act of Congress, approved March third, eighteen hundred and ninety-one, entitled, "An act to repeal timber-culture laws, and for other purposes", which provides, "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof";

And whereas, it is provided by the Act of Congress, approved March third, nineteen hundred and five, entitled, "An Act making appropriations for the current and



contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes," that "before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the Act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary";

And whereas, it is considered necessary for the public good that certain lands in the Uintah Indian Reservation be set apart and reserved as an addition to the Uintah Forest Reserve;

Now, therefore, I Theodore Roosevelt, President of the United States, by virtue of the power in me vested by the aforesaid act of Congress, approved March third, nineteen hundred and five, do hereby make known and proclaim that certain lands in the said Uintah Indian Reservation are hereby added to and made a part of the Uintah Forest Reserve, and that the boundary lines of the said forest reserve are, accordingly, so changed and extended as to read as follows:

Beginning at the north-west corner of Township one (1) South, Range seven (7) East, Salt Lake Meridian, Utah; thence easterly along the Base Line to the south-west corner of township one (1) North, Range nine (9) East;

thence northerly to the north-west corner of said township; thence easterly to the south-west corner of Township two (2) North, Range fourteen (14) East; thence northerly to the north-west corner of said township; thence easterly to the middle of the channel of the Green River; thence in a general south-easterly direction along the middle of the channel of said river to the range line between Ranges twenty-two (22) and twenty-three (23) East; thence southerly along the range line, allowing for the proper offset on the Base Line, to the south-east corner of Township two (2) South, Range twenty-two (22) East; thence westerly to the north-west corner of Township three (3) South, Range nineteen (19) East; thence southerly to the eastern boundary of the Uintah Indian Reservation; thence north-westerly along said Indian reservation boundary to the section line between Sections twenty-one (21) and twenty-eight (28), Township two (2) North, Range one (1) East, Uintah Meridian; thence westerly to the south-west corner of Section nineteen (19), Township two (2) North, Range one (1) West; thence northerly to the south-east corner of Section thirteen (13), Township two (2) North, Range two (2) West; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of Section twelve (12), said township; thence westerly to the south-west corner of Section four (4), said township; thence northerly to the north-west corner of said section; thence westerly to the north-east corner of Section four (4), Township two (2) North, Range three (3) West; thence southerly to the south-east corner of Section thirty-three (33), said township thence westerly to the north-east corner of Township one (1) North, Range six (6) West; thence southerly to the



south-east corner of Section thirteen (13) said township; thence westerly to the south-west corner of said section; thence northerly to the north-west corner of said section; thence westerly to the south-west corner of Section eleven (11), said township; thence northerly to the north-west corner of said section; thence westerly to the north-east corner of Section eight (8), said township; thence southerly to the south-east corner of Section seventeen (17), said township; thence westerly to the north-east corner of Section twenty-one (21), Township one (1) north, Range nine (9) West; thence southerly to the south-east corner of said section; thence westerly to the south-west corner of Section nineteen (19), said township, thence southerly along the range line, allowing for the proper offset on the Base Line, to the north-west corner of Section eighteen (18), Township one (1) South, Range nine (9) West; thence easterly to the north-east corner of Section sixteen (16), Township one (1), South, Range eight (8) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence westerly to the north-east corner of Section four (4), Township two (2) South, Range ten (10) West; thence southerly to the south-east corner of Section sixteen (16), said township; thence westerly to the south-west corner of Section eighteen (18), and township two (2) South, Range eleven (11) West; thence westerly to the south-west corner of Section thirty-three (33), said township; thence northerly to the south-east corner of Section twenty (20), said township; thence westerly to the south-west corner of said section; thence northerly to the south-east corner of Section seven (7), said township, thence westerly to the south-west corner of said section; thence northerly to the north-west corner

of said township; thence westerly to the north-east corner of fractional Section four (4), Township two (2) South, Range twelve (12) West; thence southerly to the south-east corner of Section thirty-three (33), said township; thence easterly to the north-east corner of Section three (3), Township three (3) South, Range twelve (12) West; thence southerly to the south-east corner of said section; thence easterly to the north-east corner of Section eleven (11), said township; thence southerly to the south-east corner of said section; thence easterly to the north-east corner of Section thirteen (13), said township; thence southerly to the south-east corner of Township four (4) South, Range twelve (12) West; thence easterly to the south-west corner of Section thirty-three (33), Township four (4) South, Range eleven (11) West; thence northerly to the north-west corner of said section; thence easterly to the south-west corner of Section twenty-five (25), said township; thence northerly to the north-west corner of said section; thence easterly to the north-east corner of Section thirty (30), Township four (4) South, Range ten (10) West; thence southerly to the south-east corner of Section thirty-one (31), said township; thence easterly to the south-west corner of Township four (4) South, Range nine (9) West; thence northerly to the north-west corner of Section thirty (30) said township; thence easterly to the north-east corner of Section twenty-five (25), said township; thence southerly to the south-east corner of said township; thence westerly to the north-east corner of Section five (5), Township five (5) South, Range eight (8) West; thence southerly to the south-east corner of Section seventeen (17), said township; thence westerly to the south-west corner of Section eighteen (18), said township;



thence southerly to the south-east corner of Section twenty-four (24), Township five (5) South, Range nine (9) West; thence westerly to the north-east corner of Section twenty-eight (28), said township; thence southerly to the south-east corner of said section; thence westerly to the south-west corner of Section twenty-nine (29), said township; thence southerly to the north-west corner of Section twenty-nine (29), Township six (6) South, Range nine (9) West; thence easterly to the south-west corner of Section twenty-one (21), Township six (6) South, Range eight (8) West; thence northerly to the north-west corner of Section four (4), said township; thence easterly to the eastern boundary of the Unitah Indian Reservation; thence in a general south-westerly and north-westerly direction along said Indian reservation boundary to the range line between Ranges six (6) and seven (7) East, Salt Lake Meridian; thence northerly to the north-west corner of Township one (1) South, Range seven (7) East, the place of beginning; such of the above-named corners as have not been established by the official surveys being intended to be located at the points where such corners would fall in projecting the surveys in the directions indicated without allowing for any irregularities which may occur in actually extending the surveys;

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: *Provided*, that this exception shall not continue to apply to

any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made.

Warning is hereby expressly given to all persons not to make settlement upon the lands reserved by this proclamation.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth.

By the President: THEODORE ROOSEVELT

ALVEY A. ADDEE
*Acting Secretary of State.*

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**15.Presidential Proclamation of July 14, 1905, 34 Stat., 3119, III Kapp. 605 (1913), LD 108:**

**BY THE PRESIDENT OF THE UNITED STATES OF AMERICA**

**A PROCLAMATION.**

Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws



shall pay therefor at the rate of one dollar and twenty-five cents per acre".

And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:

That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the Act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: Provided, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish war or Philippine insurrection as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States; and it is further directed and prescribed that:

Commencing at 9 o'clock a.m. Tuesday, August 1, 1905, and ending at 6 o'clock p.m. Saturday, August 12, 1905, a registration will be had at Vernal, Price and Provo, State of Utah, and at Grand Junction, State of Colorado, for the purpose as ascertaining what persons desire to enter, settle upon, and acquire title to any of said lands under the homestead law, and of ascertaining their qualifications so to do. To obtain registration each applicant will be required to show himself duly qualified, by written application to be made only on a blank form provided by the Commissioner of the General Land Office, to make homestead entry of these lands under existing laws, and to give the registering officer such appropriate matters of description and identity as will protect the applicant and the Government against any attempted impersonation. Registration cannot be effected through the use of the mails or the employment of an agent, excepting that honorably discharged soldiers and sailors entitled to the benefits of section 2304 of the Revised Statutes of the



United States, as amended by the act of Congress, approved March 1, 1901 (31 Stat., 847), may present their applications for registration and due proofs of their qualifications through an agent of their own selection, having a duly executed power of attorney on a blank form provided by the Commissioner of the General Land Office, but no person will be permitted to act as agent for more than one such soldier or sailor. No person will be permitted to register more than once or in any other than his true name.

Each applicant who shows himself duly qualified will be registered and given a nontransferable certificate to that effect, which will entitle him to go upon and examine the lands to be opened hereunder; but the only purpose for which he can go upon and examine said lands is that of enabling him later on, as herein provided, to understandingly select the lands for which he may make entry. No one will be permitted to make settlement upon any of said lands in advance of the opening herein provided for, and during the first sixty days following said opening no one but registered applicants will be permitted to make homestead settlement upon any of said lands and then only in pursuance of a homestead entry duly allowed by the local land officers, or of a soldier's declaratory statement duly accepted by such officers.

The order in which, during the first sixty days following the opening, the registered applicants will be permitted to make homestead entry of the lands opened hereunder, will be determined by a drawing for the district publicly held at Provo, Utah, commencing at 9 o'clock a.m., Thursday, August 17, 1905, and continuing for such period as may be necessary to complete the

same. The drawing will be had under the supervision and immediate observance of a committee of three persons whose integrity is such as to make their control of the drawing a guaranty of its fairness. The members of this committee will be appointed by the Secretary of the Interior, who will prescribe suitable compensation for their services. Preparatory to this drawing the registration officers will, at the time of registering each applicant who shows himself duly qualified, make out a card, which must be signed by the applicant, and giving such a description of the applicant as will enable the local land officers to thereafter identify him. This card will be subsequently sealed in a separate envelop which will bear no other distinguishing label or mark than such as may be necessary to show that it is to go into the drawing. These envelopes will be carefully preserved and remain sealed until opened in the course of the drawing herein provided. When the registration is completed, all of these sealed envelopes will be brought together at the place of drawing and turned over to the committee in charge of the drawing, who, in such manner as in their judgment will be attended with entire fairness and equality of opportunity, shall proceed to draw out and open the separate envelopes and to give to each inclosed card a number in the order in which the envelope containing the same is drawn. The result of the drawing will be certified by the committee to the officers of the district and will determine the order in which the applicants may make homestead entry of said lands and settlement thereon.

Notice of the drawings, stating the name of each applicant and number assigned to him by the drawing, will be posted each day at the place of drawing, and each



applicant will be notified of his number, and of the day upon which he must make his entry, by a postal card mailed to him at the address given by him at the time of registration. The result of each day's drawing will also be given to the press to be published as a matter of news. Applications for homestead entry of said lands during the first sixty days following the opening can be made only by registered applicants and in the order established by the drawing.

Commencing on Monday, August 28, 1905, at 9 o'clock a.m., the applications of those drawing numbers 1 to 50, inclusive, must be presented at the land office in the town of Vernal, Utah, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 51 to 100, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

To obtain the allowance of a homestead entry, each applicant must personally present the certificate of registration theretofore issued to him, together with a regular homestead application and the necessary accompanying proofs, together with regular land office fees, but an

honorably discharged soldier or sailor may file his declaratory statement through his agent, who can represent but one soldier or sailor as in the matter of registration.

Persons who make homestead entry for any of these lands will be required to pay therefor at the rate of one dollar and twenty-five cents per acre when they make final proof, but no payment, other than the usual fees and commissions will be required at the time the entry is made.

Persons who apply to make entry of these lands prior to October 27, 1905, will not be required to file the usual nonmineral affidavit with their applications to enter, but such affidavit must be filed before final proof is accepted under their entries; but all persons who make entry after that date will be required to file that affidavit with their applications to enter.

The production of the certificate of registration will be dispensed with only upon satisfactory proof of its loss or destruction. If at the time of considering his regular application for entry it appears that an applicant is disqualified from making homestead entry of these lands, his application will be rejected, notwithstanding his prior registration. If any applicant shall register more than once hereunder, or in any other than his true name, or shall transfer his registration certificate, he will thereby lose all the benefits of the registration and drawing herein provided for, and will be precluded from entering or settling upon any of said lands during the first sixty days following said opening.

Any person or persons desiring to found, or to suggest establishing, a townsite upon any of the said lands,



at any point, may, at any time before the opening herein provided for, file in the land office a written application to that effect, describing by legal subdivisions the lands intended to be affected, and stating fully and under oath the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commissioner of the General Land Office with their recommendation in the premises. Such Commissioner, if he believes the public interests will be subserved thereby, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the time being for disposal under the townsite laws of the United States in such manner as the Secretary of the Interior may from time to time direct; and, if at any time after such withdrawal has been made it is determined that the lands so withdrawn are needed for townsite purposes they may be released from such withdrawal and then disposed of under the general provisions of the homestead laws in the manner prescribed herein.

All persons are especially admonished that under the said act of Congress approved March 3, 1905, it is provided that no person shall be permitted to settle upon, occupy, or enter any of said lands except in the manner prescribed in this proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry. After the expiration of the said period of sixty days, but not before, as hereinbefore prescribed, any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general

provisions of the homestead and townsite laws of the United States in like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law.

The Secretary of the Interior shall prescribe all needful rules and regulations necessary to carry into full effect the opening herein provided for.

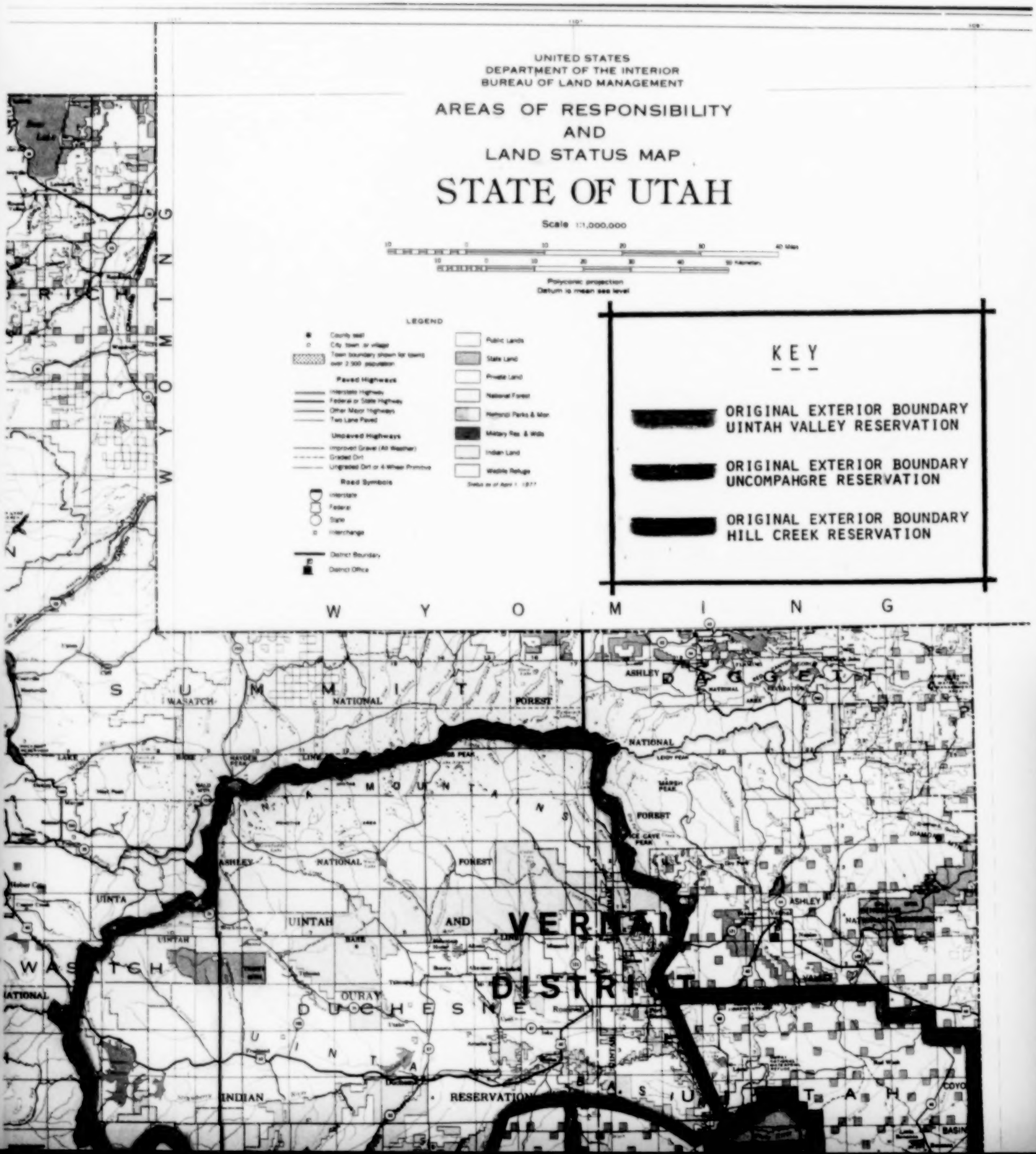
In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed. Done at the city of Washington this 14th July, in the year of our Lord 1905, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] THEODORE ROOSEVELT

BY THE PRESIDENT:

ALVEY A. ADEE

*Acting Secretary of State.*


UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
AREAS OF RESPONSIBILITY
AND
LAND STATUS MAP
STATE OF UTAH
Scale 1:1,000,000
Polyconic projection
Datum is mean sea level
LEGEND
County seat
City, town or village
Town boundary shown for towns over 2,500 population
Paved Highways
Interstate Highway
Federal or State Highway
Other Major Highways
Two Lane Paved
Unpaved Highways
Improved Gravel (All Weather)
Graded Dirt
Ungraded Dirt or 4 Wheel Primitive
Road Symbols
Interstate
Federal
State
Interchange
District Boundary
District Office
Public Lands
State Land
Private Land
National Forest
National Parks & Mon
Military Res. & Wdls
Indian Land
Wildlife Refuge
KEY
ORIGINAL EXTERIOR BOUNDARY
UINTAH VALLEY RESERVATION
ORIGINAL EXTERIOR BOUNDARY
UNCOMPAHGRE RESERVATION
ORIGINAL EXTERIOR BOUNDARY
HILL CREEK RESERVATION
SWEETWATER
RICH
SUMMIT
WASATCH
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MOUNTAINS
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AND
OURAY
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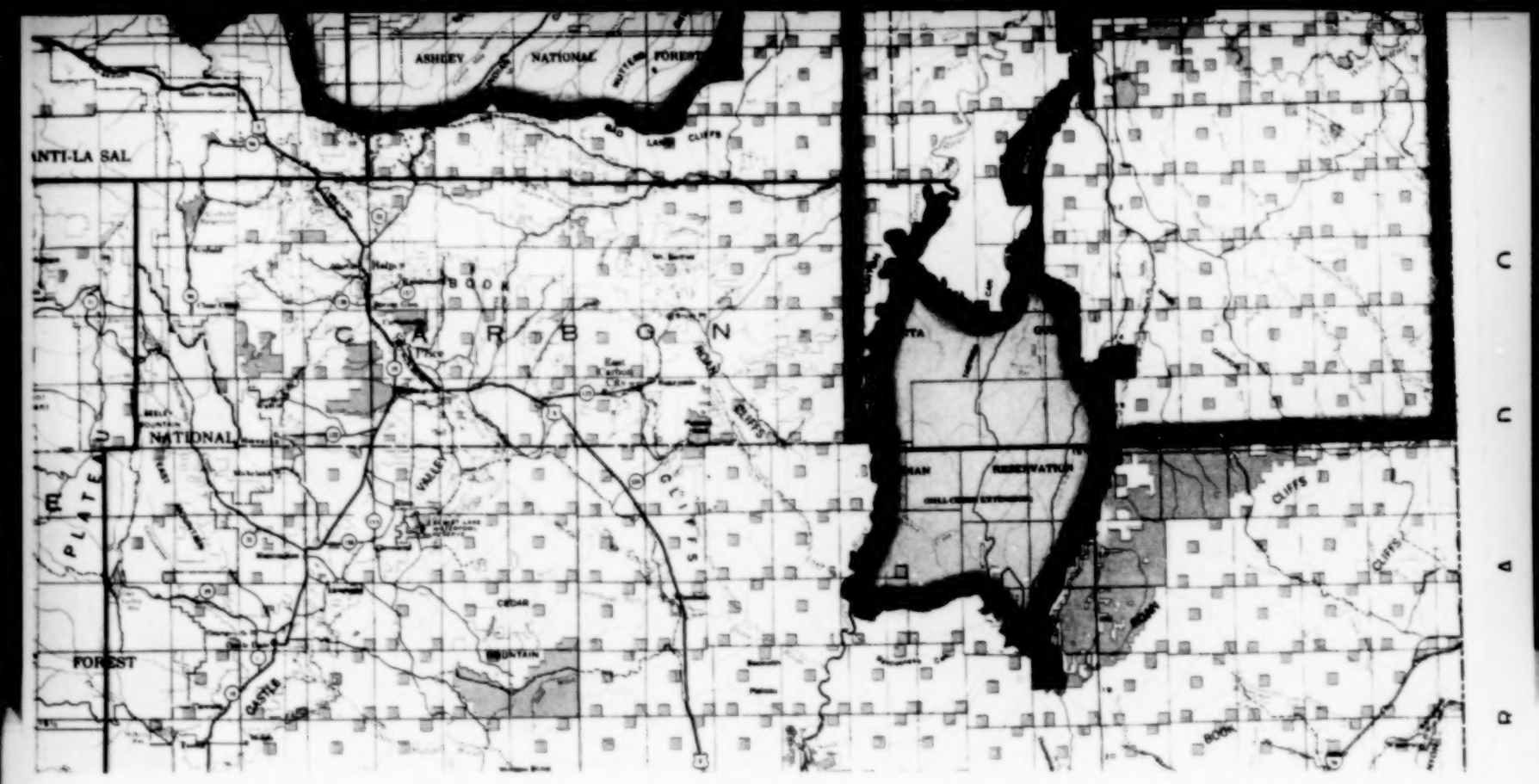
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VALLEY
CEDAR
MOUNTAIN
GASTLE
RESERVATION
BOOK

**Supreme Court of the United States**

*No.* 92-6281

Robert Hagen,
Petitioner

v.

Utah

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Utah.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 19, 1993

Supreme Court, U.S.
FILED
JUL 1 1993
OFFICE OF THE CLERK

No. 92-6281

In The

# Supreme Court of the United States

October Term, 1993

ROBERT P. HAGEN,

*Petitioner,*

vs.

STATE OF UTAH,

*Respondent.*

On Writ Of Certiorari
To The Supreme Court Of Utah

## BRIEF OF PETITIONER

MARTIN E. SENECA, JR.
1820 Michael Faraday Drive
Reston, VA 22090
(703) 471-5474

Counsel of Record

DANIEL H. ISRAEL
1715 Pearl Street, Suite C
Boulder, CO 80302
(303) 939-8180

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Did the Supreme Court of Utah, in the case of *State v. Perank*, properly decide that the Uintah and Ouray Indian Reservation was diminished by the Act of May 27, 1902, Ch. 888, 32 Stat. 245, so as to confer upon the State of Utah criminal jurisdiction over Petitioner, Robert P. Hagen?

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State v. Hagen, 191 Utah Adv.Rep. 26, 19 Indian Law Rep. 5190 (1992)..... *passim*

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## OPINIONS BELOW

The opinion of the Supreme Court of Utah in *State v. Hagen* is unofficially reported in 191 Utah Adv.Rep. 26, 19 Indian Law Rep. 5190 (1992), and reprinted in the Joint Appendix at J.A. 15. The opinion of the Utah Court of Appeals in *State v. Hagen* is found at 802 P.2d 745 (Utah App.1990). The opinion of the Utah District Court in *State v. Hagen*, Duchesne County Case No. 89CR41D, January 22, 1989, is found in the Record, page 61. The opinion of the Utah Supreme Court in *State v. Perank* is unofficially reported in 191 Utah Adv.Rep. 5, 19 Indian Law Rep. 5191 (1992), and reprinted at J.A. 18. The opinion of the United States Court of Appeals for the Tenth Circuit *en banc* in *Ute Indian Tribe v. State of Utah* is reported at 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), and reprinted at J.A. 88. The panel opinion of the Tenth Circuit Court of Appeals in *Ute Indian Tribe v. State of Utah* is reported at 716 F.2d 1298 (1983). The opinion of the Federal District Court in *Ute Indian Tribe v. State of Utah* is reported at 521 F.Supp. 1072 (D. Utah 1981).

## JURISDICTION

The judgment of the Utah Supreme Court in *State v. Hagen*, and *State v. Perank*, was entered on July 17, 1992. There was no motion for reconsideration. Petitioner brought his petition under 28 U.S.C. § 1257(3).

On August 4, 1992, in the case of *State v. Perank*, the Supreme Court of Utah stayed the issuance of its remittitur and "the finality of the judgment of the Court" pending the conclusion of any proceedings on certiorari

to the Court, and "the final disposition of the injunctive proceedings pending in the United States District Court for the District of Utah."[1] (Reprinted in Brief of *Amicus Curiae* Ute Indian Tribe in Opposition to Granting the Writ of *Certiorari*, p. 12-A) Mr. Perank did not seek a writ of certiorari to the Court.

On August 18, 1992, in the Petitioner's case, *State v. Hagen*, the Supreme Court of Utah stayed the issuance of its remittitur for 90 days pending Petitioner's "decision to file a petition for a writ of certiorari in the United States Supreme Court." (Reprinted in Brief of *Amicus Curiae* Ute Indian Tribe in Opposition to Granting the Writ of *Certiorari*, p. 13-A)

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendments Six and Fourteen of the Constitution of the United States are reprinted in Mr. Hagen's Appendix

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[1] On September 2, 1992, *nunc pro tunc*, August 3, 1992, the United States District Court, District of Utah, Central Division, in Civil Action No. C75-408J, *Ute Indian Tribe v. State of Utah and Duchesne County, Uintah County, Roosevelt City, and Duchesne City*, issued an Order, incorporating an attached Stipulation by reference. In part, that Order stated: "The parties shall comply with the provisions of said stipulation until this Court issues its decision on the merits of the Tribe's Renewed Motion for Injunctive Relief or until such other date as is fixed by agreement between the parties or by order of this Court." The Stipulation incorporated by reference includes the following language: "1. The State, local defendants, their officers, agents, employees and any person acting in their behalf shall refrain from enforcing the Utah Supreme Court's decision in *State v. Perank*, No. 8602433 (Utah July 17, 1992). . . . " (the order of the Federal District Court with its attached Stipulation is reprinted in Brief of *Amicus Curiae* Ute Indian Tribe in Opposition to Granting the Writ of *Certiorari*, pp. 5-A - 11-A) To the Petitioner's knowledge the aforementioned Order and Stipulation remain in effect.



at A-1. 18 U.S.C. §§ 1151, 1152 & 1153 are reprinted in Mr. Hagen's Appendix at A-2. Statutes and Presidential Proclamations relevant to the Uintah Valley Reservation may be found at J.A. 159-184 including: 1) 32 Stat. 245, 263, as amended, J.A. 159; 2) 32 Stat. 982, 997-998, J.A. 163; 3) 33 Stat. 189, J.A. 166; 4) 33 Stat. 1048, 1069-70, J.A. 166; and, 5) Presidential Proclamation of July 14, 1905, 34 Stat. 3119, J.A. 176. These, and other statutory materials considered by the Federal District Court may be found in *Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072 (D. Utah 1981).

## STATEMENT OF THE CASE

### A. Introduction

Robert P. Hagen is a criminal defendant. His liberty is at issue in this appeal. Though the Court's disposition of this appeal may also affect other Indians living in the Uintah Valley Reservation in northeast Utah, it is certain to have direct and lasting consequences in Mr. Hagen's life.

At its roots, this case involves the issue of criminal jurisdiction in the small town of Myton, Utah. Myton was the site of Mr. Hagen's criminal charge under the State of Utah law. Mr. Hagen, a mixed-blood Chippewa, believed Myton was in Indian Country, within the exterior boundaries of the Uintah Valley Reservation portion of the Ute Indian Tribe's Uintah and Ouray Reservation. He relied upon his Indian identity and the precedent and collateral estoppel effect of the decision in *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985) (*en banc*), cert. denied, 479 U.S. 994 (1986) (hereinafter, "*Ute Tribe en banc*"), and on the decision below, *Ute Indian Tribe v. State of Utah*, 521

F.Supp. 1072 (D. Utah 1981) (hereinafter *"Ute Tribe District Ct."*) to challenge Utah's assertion of criminal jurisdiction. Ultimately, his challenge failed before the Utah Supreme Court which decided, contrary to the federal courts, that the Uintah Valley Reservation had been disestablished and that Myton, therefore, was not in Indian Country, *Utah v. Hagen*, 191 Utah Adv.Rep. 26, 19 ILR 5190 (1992) (hereinafter *"Hagen"*).[2]

Lurking behind Mr. Hagen's presence before this Court is the ten-year-old scheme of the State of Utah to relitigate the findings in *Ute Tribe en banc, id.* Therefore, the "rest of the story" involves the role played by the State of Utah to achieve its ulterior motive, the disestablishment of the Uintah Valley Reservation through the device of two simultaneous criminal appeals – Mr. Hagen's and that of Clint Perank, also a mixed-blood Indian. *See, Utah v. Perank*, 191 Utah Adv.Rep. 5, 19 ILR 5191 (1992) (hereinafter *"Perank"*).

### B. Hagen Case – Statement of Facts

Robert Palmer Hagen is an enrolled member of the Little Shell Band of Chippewa Indians of Montana, a non-federally-recognized Tribe. At the time of arrest in 1988, he had lived for five to six years on the Ute Reservation on nontrust land in the vicinity of Myton, Utah. Throughout his life he has identified himself as, and has considered himself to be, an Indian.

On or about April 19, 1988 (R.1), the State of Utah filed charges against Mr. Hagen for crimes which allegedly took place at his trailer in Myton, Utah. On or

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[2] State criminal jurisdiction does not extend to Indians who commit crimes in Indian Country. 18 U.S.C. § 1151, 1152, 1153 (1982 & Supp. 1992)



about July 28, 1988, the Duchesne County prosecutor dismissed those charges on motion to the court, in the mistaken belief that federal charges had been filed (R.17).

On or about March 13, 1989, the State refiled the charges previously dismissed without prejudice, having learned that no federal prosecution had taken place (R.19). The state charged Mr. Hagen with two third-degree felonies and one class B misdemeanor, i.e., distribution of a controlled substance (marijuana), possession of a controlled substance with intent to distribute, and possession of paraphernalia (R.20).

On or about August 28, 1989, after plea negotiations, Mr. Hagen entered into a guilty plea for distribution of a controlled substance, a third-degree felony, and the State moved to dismiss further charges against him (R.33).

On or about January 4, 1990, after having obtained new counsel, Mr. Hagen moved to withdraw his guilty plea and to arrest judgment on the basis of the Utah district court's lack of subject matter jurisdiction over an Indian in Indian Country (R.53-58). On or about January 22, 1990, in an evidentiary hearing considering Mr. Hagen's Indian status, where Mr. Hagen was the sole witness, he was examined, cross-examined, examined on redirect, and on recross. The State produced no witnesses, and only one exhibit. After oral argument, in the course of which the State conceded or stipulated to most of the defendant's evidence of Indian identity, the Utah district court affirmed Utah's criminal jurisdiction by holding that Mr. Hagen was not an Indian. (R.81-117) Thereby the judge avoided reaching the issue of Uintah Valley Reservation disestablishment, openly expressing that he would not have been able to rule on the disestablishment question because of his longstanding bias as a result of years of litigating that issue (R.105).

On or about February 15, 1990, Mr. Hagen filed his appeal in the Utah Court of Appeals (R.65-66). Mr. Hagen raised both aspects of subject matter jurisdiction, his Indian identity, which was argued extensively, and the Indian Country aspect, which was summarily discussed by reference to the federal courts' holding in *Ute Tribe en banc*. Brief of Appellant, (Hagen), Utah Court of Appeals, *State v. Hagen*, 802 P.2d 745 (Utah. App. 1990).

On November 23, 1990, the Utah Court of Appeals discharged Mr. Hagen, reversing the court below on the jurisdictional question. *See, State v. Hagen*, 802 P.2d 745 (Utah App. 1990). It held that the State had failed to prove under established state law procedures that Mr. Hagen was not an Indian. It also held that, on the basis of the federal court's ruling in *Ute Tribe en banc*, the Uintah Valley Reservation had not been disestablished so as to exclude Myton from its boundaries. On the basis of collateral estoppel and the Supremacy Clause, the Utah Court of Appeals believed that the Utah Supreme Court in a related case – *Perank* – (discussed, *infra*) could not reach a decision contrary to the findings in *Ute Tribe en banc*. Therefore, the Court of Appeals declined to delay its decision, as had been requested by the State of Utah, and freed Mr. Hagen from custody.

On or about April 23, 1991, the Utah Supreme Court granted the State of Utah's petition for certiorari in the *Hagen* case. Mr. Hagen advanced a strong collateral estoppel argument to challenge Utah's jurisdiction, relying on the *Ute Tribe en banc* holding. Brief of Appellee, (Hagen), Utah Supreme Court, p. 6-14, *Utah v. Hagen, supra*. The State of Utah diverted the Utah Supreme Court's attention from making a disestablishment ruling in *Hagen*, and directed it to making that ruling in *Perank (infra)*. Brief of Appellant, (Utah), p. 1-5, *Utah v. Hagen, supra*. Perank had



never raised collateral estoppel. *See*, Perank Briefs, *Utah v. Perank, supra*.

On July 17, 1992, the Utah Supreme Court issued simultaneous decisions in three cases, Mr. Hagen's, and the cases of Patrick Coando, and Clint Perank. *See, Perank, supra; Hagen, supra;* and *Utah v. Coando*, ___ Utah Adv.Rep. ___, 19 ILR 5189 (1992). In the latter case, the Supreme Court of Utah held that the Uintah Valley Reservation had been disestablished, resulting in State court jurisdiction in the area of Myton. In a summary opinion, the Utah Supreme Court decided the *Hagen* case by reference to its decision on the reservation boundary issue in *Perank*. The Utah Supreme Court never adjudicated Mr. Hagen's collateral estoppel defense in his case. *Utah v. Hagen*, 19 ILR 5190.

### C. Perank Case – Statement of Facts

*Perank*, although decided by the Supreme Court of Utah on the same date as Mr. Hagen's case, antedates Mr. Hagen's case by a number of years. The factual background and procedural posture of Perank are part of the backdrop of Mr. Hagen's case. By virtue of the State's consistent cross-referencing throughout the appellate process, *Perank* became indissolubly linked to Mr. Hagen's appeal. Clint Perank pled guilty to burglary, a third-degree felony charge, and was sentenced on October 27, 1983. On April 21, 1986, after a number of probation violations, Mr. Perank was summoned to court to answer for the latest violations. At that time, he challenged Utah's jurisdiction on the basis of his Indian identity and the situs of his alleged crime, Myton, Utah, which he alleged was within the Uintah Valley Reservation in Indian Country. The Utah District Court rejected

this argument, leading to Mr. Perank's appeal on May 13, 1986.

In the course of Mr. Perank's appeal, the Utah Court of Appeals transferred *Perank* to the Utah Supreme Court. The appeal was delayed, in part, by stipulation of the parties pending the resolution of the State of Utah's attempt to obtain review from this Court of the decision in *Ute Tribe en banc*. *Perank* resumed upon the Court's 1986 denial of certiorari in *Ute Tribe en banc*.

Amicus briefs were invited from the Ute Indian Tribe and the United States of America, and upon motion were allowed for the Utah counties of Duchesne and Uintah. The *amici curiae* strongly urged the Utah Supreme Court to disestablish the Uintah Valley Reservation as virtually the only way to insure its ultimate litigation before the United States Supreme Court. Brief of Duchesne and Uintah Counties (*Perank*), Utah Supreme Court, p. 3-9. The Utah Supreme Court heard oral argument in the *Perank* case on October 11, 1988, then took almost four Years, until July 17, 1992 in which to issue its decision disestablishing the Uintah Valley Reservation, during which time it chose to grant the State's petition for certiorari in *Hagen*. Myton, Utah, the situs of Mr. Perank's alleged crime, was declared not to have been in Indian Country. The *Perank* holding was transferred to the holdings in *Hagen* and *Coando* decided on the same date.

### D. Uintah Valley Reservation – Litigation History

Whether the State of Utah can prosecute Indians in *Hagen* and in *Perank* arises from the legal history of the Uintah Valley Reservation. By the Act of May 5, 1864, 13 Stat. 63, chap. LXXVII Congress established the Uintah Valley Reservation as a permanent home for the Ute Indian Tribe. Subsequently, the Act of March 3, 1905, 33



Stat. 1048, 1069-71 opened the Reservation lands, including the townsite of Myton, to nonIndian settlers.

On October 15, 1975, the Ute Indian Tribe brought suit in the federal district court in Utah to establish the exterior boundaries of the Reservation. On June 19, 1981, in an exhaustive eighty-five-page, detailed analysis, the federal district court held that the 1905 Act did not disestablish the Uintah Valley Reservation, and for purposes of this current litigation, the town of Myton remained therein. *Ute Tribe District Ct., supra*. In 1985 the United States Court of Appeals for the Tenth Circuit, *en banc*, affirmed that the Uintah Valley Reservation had not been disestablished and also ruled that the Uncompahgre Reservation, a second Ute Reservation, had not been disestablished. *Ute Tribe en banc*. The Court denied Utah's petition for writ of certiorari on December 1, 1986, 479 U.S. 994 (1986).

Throughout the course of the litigation of *Hagen* and *Perank* in the Utah courts, the State and both criminal defendants referred to the *Ute Tribe* cases. Utah has unflaggingly disputed the *Ute Tribe en banc* holding and both Mr. Perank and Mr. Hagen have consistently used that decision as a precedent, binding upon the Utah courts, and in Mr. Hagen's case, as a precedent collaterally estopping the State from relitigating the issue of the Uintah Valley Reservation boundary.

## SUMMARY OF ARGUMENT

Before the federal courts in the 1970s and 1980s, the State of Utah and its subdivisions, Duchesne and Uintah Counties, sought a full and fair determination of the boundaries and status of the Uintah and Ouray Indian Reservation, including the status of the Uintah Valley Reservation established by the Act of May 5, 1864, 13 Stat.

63, Chap. LXXVII. Indeed, the State through its Counties, told the United States Court of Appeals for the Tenth Circuit that its 1985 *en banc* review of the issue will define "once and for all, the governmental authority of the various parties in the area involved."

Notwithstanding that pledge to the federal courts, when the United States Court of Appeals for the Tenth Circuit issued *Ute Tribe en banc* in favor of the Ute Indian Tribe, the State of Utah undertook state law prosecution of three Indian defendants in an effort to reverse the holding of the United States Court of Appeals for the Tenth Circuit. In the first of those efforts, *Perank*, Duchesne and Uintah Counties urged the Utah Supreme Court to disavow the United States Court of Appeals for the Tenth Circuit *en banc* holding, stating, "A conflict between a state supreme court and a court of appeals is practically a prerequisite for *certiorari* to be granted in cases of this nature. *Amici* would submit that this is the case and now is the time for the view of this Court to be expressed." Brief of Duchesne and Uintah Counties, *amici curiae*, in support of State of Utah, *Perank*, p. 3.

In order to effect a satisfactory end run around the holding in *Ute Tribe en banc*, the Utah Supreme Court thereafter submerged the appeal of Mr. Hagen, the petitioner here, into the appeal of Clint Perank. Had the Utah Supreme Court directly confronted the Court's collateral estoppel teachings raised by Mr. Hagen, Mr. Hagen's prosecution would have been dismissed in recognition of the holding in *Ute Tribe en banc*. But, because the Utah Supreme Court elected to submerge the Hagen appeal into the *Perank* appeal, where collateral estoppel was not raised, Mr. Hagen's meritorious defense of collateral estoppel was never adjudicated, thereby denying Mr. Hagen his federal due process right to a full and fair



appellate review under the Fourteenth Amendment, and his federal right to effective assistance of counsel under the Sixth and Fourteenth Amendments. These violations of Mr. Hagen's rights require that his prosecution be dismissed with prejudice.

Under the holding in *Ute Tribe en banc* Mr. Hagen is entitled to be prosecuted, if at all, by the United States and/or the Ute Indian Tribe. The Tenth Circuit Court of Appeals faithfully applied the Court's settled precedent in holding that the Act of March 3, 1905, 33 Stat. 1048, 1069-71, did not disestablish the Uintah Valley Reservation. If the Court reaches the merits of the boundary issue in this appeal, it should find, as did the Court of Appeals *en banc* eight years ago, that the language utilized by Congress, the legislative history, and surrounding circumstances all indicate that Congress intended to open the Uintah Valley Reservation in order to permit nonIndians and Indians to live side-by-side. Nothing in the Act, the legislative history, nor the surrounding circumstances demonstrates a clear understanding on the part of the Ute Indians that they were renouncing their Reservation boundary. Under the Court's settled precedent, therefore, the Uintah Valley Reservation should be found to be intact, and Mr. Hagen's criminal prosecution should be dismissed with prejudice.

## ARGUMENT

### I. THE UTAH SUPREME COURT IMPROPERLY DECIDED THE UINTAH VALLEY RESERVATION BOUNDARY, BECAUSE THE TENTH CIRCUIT EN BANC DECISION IN *UTE INDIAN TRIBE V. UTAH* COLLATERALLY ESTOPS THE STATE OF UTAH FROM ASSERTING CRIMINAL JURISDICTION OVER ROBERT HAGEN.

#### A. Introduction and Elements of Collateral Estoppel

The State of Utah's case against the defendant should be dismissed with prejudice because the doctrine of collateral estoppel precludes the State from relitigating its subject matter jurisdiction within the exterior boundaries of the Uintah Valley Reservation. Robert Hagen challenged the subject matter jurisdiction of the State of Utah to prosecute him on criminal charges. He based his challenge on Federal criminal law, i.e., 18 U.S.C. §§ 1151, 1152 and 1153 (R.54-58). This statutory scheme mandates Federal court jurisdiction, provided: 1) the criminal suspect is an Indian; and, 2) the situs of the crime is in Indian Country. Although Mr. Hagen and the State disputed his Indian status in the trial court, the Utah Court of Appeals overruled the trial court, and found Mr. Hagen was an Indian. *State v. Hagen*, 802 P.2d 745 (Utah App. 1990). In its subsequent review of Mr. Hagen's case, the Utah Supreme Court declined to rule on Mr. Hagen's Indian status, thereby leaving the Court of Appeals' decision standing in that regard.[3] Hence, only the question of

[3] The finding that Mr. Hagen is an Indian was made pursuant to State of Utah procedures requiring the State of Utah to disprove Indian status once a criminal defendant claims he is an Indian. That finding, made under the law of the State of Utah, is



Indian Country was ruled on by the Utah Supreme Court and remains at issue in this appeal.

The situs of Mr. Hagen's alleged crime, Myton, Utah, lies within the exterior boundaries of the Uintah Valley Reservation, as determined in *Ute Tribe en banc*. On the basis of this federal precedent, Mr. Hagen argued before the Utah Supreme Court that the State was collaterally estopped from challenging the Reservation boundaries in an attempt to obtain jurisdiction over him, the Utah Court of Appeals having determined collateral estoppel would apply to defeat the State's jurisdiction. *State v. Hagen*, 802 P.2d at 747.

On appeal by the State to the Utah Supreme Court, Mr. Hagen argued vigorously that the Court should recognize the Tenth Circuit *en banc* decision not only as a precedent but also as collaterally estopping the State on this jurisdictional issue. Appellee's (Hagen's) Brief, p. 614, *Hagen, supra*. The Utah Supreme Court did not address Mr. Hagen's defense of collateral estoppel. *Hagen, supra*. Instead, it ruled summarily, by reference to its decision in *Perank*, that the State had properly exercised criminal jurisdiction over Mr. Hagen because the Uintah Valley Reservation had been disestablished. In so doing, the Utah Supreme Court impermissibly penalized Mr. Hagen for Mr. Perank's failure to raise the collateral estoppel defense. The Supreme Court completely ignored Mr. Hagen's collateral estoppel arguments. This defense, a threshold matter going to the subject matter jurisdiction of the Utah courts, is appropriate for review by the Court.

Collateral estoppel may be used in a criminal case, *Ashe v. Swenson*, 397 U.S. 436 (1970), including one in

binding on the State of Utah and accordingly is not an issue in the appeal.

which the case in which the estoppel arises is not criminal, but rather is civil. *Yates v. United States*, 354 U.S. 298 (1957) (overruled on other grounds); *United States v. Baltimore & Ohio Railroad Co.*, 229 U.S. 244 (1913). In Mr. Hagen's criminal case, the estoppel arises from the findings in *Ute Tribe en banc*, a civil action seeking declaratory judgment. Federal collateral estoppel law, therefore, allows Mr. Hagen to raise issues from *Ute Tribe en banc* for estoppel purposes in his criminal case. Moreover, because "[t]he criminal defendant is an involuntary litigant in the state tribunal, and against him all the forces of the State are arrayed," *Allen v. McCurry*, 449 U.S. 90, 116 (1980) (Blackmun, J. dissenting), "[t]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444.[4]

The courts of Utah should have applied the federal law of collateral estoppel to find that the Utah courts lacked subject matter jurisdiction over Mr. Hagen.[5] The following eight components are satisfied in this appeal.

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[4] Collateral estoppel can be raised to challenge jurisdiction, including subject matter jurisdiction. *See, e.g., Veiser v. Armstrong*, 688 P.2d 796 (Ok. 1984).

[5] The federal law of collateral estoppel, not Utah law, applies to this case, because: 1) it is a federal-question case, (*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 324, n.12 (1971)); 2) it involves issues of importance pertaining to the relationship of the United States to its Indian wards, *Seymour v. Superintendent Of Washington State Penitentiary*, 368 U.S. 351, 353-54 (1962)); and, 3) "[t]he . . . preclusion effect of the earlier judgment is determined solely by the law of the forum, state or federal, which rendered it." *United States v. Hatrak*, 588 F.2d 414, 419 (3rd Cir. 1978). Here, the issue preclusion derives from the holdings in *Ute Tribe en banc*.



The Utah courts should have found that the federal courts in *Ute Tribe District Ct.*, and *Ute Tribe en banc:* 1) were courts of competent jurisdiction, *Montana v. United States*, 440 U.S. 147, 153 (1979); 2) determined "an issue of fact or law," *Allen*, 449 U.S. at 94 in common between the first action and the estoppel action, *Blonder-Tongue*, 402 U.S. at 328-29; 3) which issue was "necessary to [the first court's] judgment," *Allen*, 449 U.S. at 94; and, 4) made a "valid and final judgment," *Ashe*, 397 U.S. at 443. Additionally, the Utah courts, by comparing the parties in the two actions and by examining the litigation in the first action, should have found that the party against whom the estoppel is sought in the estoppel action: 5) was a party in the first case, *Allen*, 449 U.S. at 94; 6) had a "full and fair opportunity" to litigate the issue in the first case, *Allen*, 449 U.S. at 95; 7) is not the Government in a situation wherein the *Mendoza* case applies, *United States v. Mendoza*, 464 U.S. 154 (1984); and 8) is not embraced by any other exception to the rule of collateral estoppel, as a result of the particular circumstances attendant upon the estoppel case. *Montana, supra.*

As noted above, the Utah Supreme Court did not directly address Mr. Hagen's collateral estoppel arguments, neither under Federal nor Utah law. As the following argument will show, Mr. Hagen should have prevailed on his collateral estoppel argument before the Utah courts, and should prevail on it now. Mr. Hagen will limit his discussion solely to those elements from the preceding list which require clarification.

### B. The Uintah Valley Boundary Issue in the Federal Courts Was Identical to the Indian Country Issue in the Utah courts.

In *Ute Tribe en banc*, at 1093, the court held:

> In closing, we find no evidence, either explicit or implicit, in any congressional enactment that Congress intended to diminish or disestablish the Uncompahgre and Uintah Reservations.

The federal courts' finding that the Uintah Valley Reservation boundaries were undiminished and the Uintah Valley Reservation had not been disestablished was the exact issue which Mr. Hagen presented, and on which he relied, and does now rely, to establish his collateral estoppel defense. Before the Supreme Court of Utah, Mr. Hagen stated:

> In its brief, the State correctly asserts that the issue of whether Myton is within the confines of the Ute Indian Reservation is an issue pending before this court in *State v. Perank*, No. 860196. The issue in *Ute Indian Tribe, Perank* and the instant case is identical. The issue is 'whether the Uintah Reservation was diminished. . . .'

Appellee's (Hagen's) Brief, p. 8, *Hagen, supra.*

Hence, Utah cannot deny that the subject-matter jurisdictional-predicate issue decided in the federal courts is not the same subject-matter jurisdictional-predicate issue Mr. Hagen raised and argued in his jurisdictional challenge before the Utah courts. The issues are the same.

### C. Whether the Uintah Valley Reservation Had Been Disestablished or Diminished Was Necessary to the Decision of the Tenth Circuit Court of Appeals, en banc.

The status of the Uintah Valley Reservation was the focus of attention, not the periphery of concern in the



federal court litigation. It produced volumes of controverted testimony and briefing, not gratuitous commentary; and, resulted in an actual holding, not mere dicta. *See, Ute Tribe District Ct.*, and *Ute Tribe en banc.* It answered specifically one of the questions asked by the Ute Tribe when it initiated the declaratory judgment action in the federal courts. Therefore, this issue was necessarily decided by the Tenth Circuit, and was essential to the Tenth Circuit's judgment.

### D. The State of Utah is the Same Party in Both the Federal and State Actions.

There is but one State of Utah. As the briefs and published cases reveal, consistently, throughout the *Ute Tribe* cases, culminating in *Ute Tribe en banc* and the State's unsuccessful bid for certiorari review, the State appeared through its Attorney General and through teams of assistant attorneys general. Throughout much of its federal court sojourn it was also joined by several of its own political subdivisions, e.g., Duchesne County, through their own county attorneys and their respective teams.[6]

In *Hagen* and *Perank*, the County attorneys prosecuted the defendants in the name of the State of Utah, under that state's criminal prosecution scheme. Once *Perank* and *Hagen* entered the appellate stream, however, the Attorney General of the State of Utah and teams of assistant attorneys general handled the prosecution. Some of

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[6] Only the status of the Uintah Valley Reservation is at issue in this litigation. Utah has not challenged *Ute Tribe en banc* regarding the National Forest lands associated with the Uintah Valley Reservation, nor challenged the integrity of the Uncompahgre Reservation.

the same political subdivisions, e.g., Duchesne County, submitted *amicus curiae* briefs in *Perank*.

The briefs in *Hagen* refer to, and annex *Perank* briefs, in pertinent part, as discussed, *supra*. Moreover, *Perank*, itself, incorporates by reference the record of the *Ute Tribe* cases in the federal courts. Therefore, the State of Utah cannot now argue that separate, unequal branches or levels of its government, e.g., civil authority vs. criminal enforcement authority, effectuating different goals, and having different restraints, independently pursued disparate objectives in the two lines of cases. The State, itself, by consolidating the records of the federal cases into *Hagen* and *Perank*, has vitiated any argument it might otherwise have been able to make to the effect that the "State of Utah" in the *Ute Tribe* cases is distinguishable from the "State of Utah" in *Perank* and *Hagen*. There is but one State of Utah here for collateral estoppel purposes.

**E. The State of Utah had a Full and Fair Opportunity to Litigate the Uintah Valley Reservation Boundary Issue in the Federal Courts.**

> [O]ne general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case.

*Allen*, 449 U.S. at 95.

The Court has recognized further that there is no "automatic formula for proper rulings on estoppel pleas," *Blonder-Tongue*, 402 U.S. at 334, and that such rulings must finally "rest on the . . . courts' sense of justice and equity." *Id.* Throughout the briefing history of *Hagen* and *Perank*, the State of Utah never alleged that it had been



deprived by the federal courts of a full and fair opportunity to litigate its interests in the *Ute Tribe* cases. On the contrary, the State of Utah has virtually vouched for the fullness and fairness of its prior opportunity in the *Ute Tribe* cases by incorporating the record therein into *Perank* and *Hagen*, without caveat.[7] A straight-faced argument that the procedures in the *Ute Tribe* cases were incomplete or unfair vis-a-vis the State of Utah would seem impossible. In reaching its decision on the Reservation-boundary issue, the district court took testimony from 18 witnesses, and admitted more than 800 documentary exhibits. The District Court stated:

> Besides giving careful scrutiny to these documents and the record at trial, t[he district] court . . studied the extensive pretrial memoranda and post-trial briefs submitted by the parties and the United States as *amicus*, and . . . examined numerous historical documents authenticated in the discovery process but not included in the compilation of joint exhibits offered at trial, and other learned treatises and historical works that [were] relevant to this Court's determinations.

*Ute Tribe District Ct.* at 1080.[8]

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[7] Moreover, it is especially worth noting that both the State of Utah and its courts have supported the jurisdictional competency of the Federal Courts, and have relied exclusively on the "voluminous" factual record on review before the Tenth Circuit in the *Ute Tribe* case. *See*, Brief of Respondent in Support of Petition for Writ of Certiorari, pp. 3, 11, & Appendix E – stipulations.

[8] Utah has admitted that it received a full and fair trial in its Appellee's Brief in *Ute Tribe en banc*: "While Utah did not receive all that it requested in the lower court, it does feel that it had a fair trial, and that it is virtually impossible for any party to present a persuasive argument to show that the district court committed reversible error."

Therefore, Mr. Hagen firmly believes that under any reading of "justice and equity" the State of Utah had a full and fair opportunity to litigate the *Ute Tribe* cases, and specifically the jurisdictional predicate issue salient to Mr. Hagen's case, the boundary and existence of the Uintah Valley Reservation.

### F. Mr. Hagen can collaterally estop the State of Utah, the case of *United States v. Mendoza* notwithstanding.

After the doctrine of mutuality became moribund in *Blonder-Tongue, supra,* this Court openly approved the use of nonmutual offensive collateral estoppel. *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322 (1979) Thereafter, it was conditionally possible for a nonparty to a prior action to use collateral estoppel in a later action against a party to the prior action who happened to oppose him in the later action.

Subsequently, in *Mendoza, supra,* the Court limited the use of nonmutual offensive collateral estoppel against the United States Government. *Mendoza,* 464 U.S. at 162. *Mendoza* involved a private party who sought to use collateral estoppel solely against the United States. Mr. Hagen, on the other hand, is a private party seeking to use collateral estoppel against the State of Utah, not against the United States.[9]

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[9] *Mendoza* was decided nearly ten years ago. Mr. Hagen has been unable to locate any published state court decisions applying *Mendoza* to shield state government from collateral estoppel. The Eleventh Circuit applied *Mendoza* to prevent collateral estoppel against the State of Florida, *Hercules Carriers, Inc. v. Claimant State of Florida, Department of Transportation,* 768 F.2d 1558 (1985), a decision other Circuits have declined to follow. *See, Benjamin v. Coughlin,* 708 F.Supp. 570 (S.D.N.Y. 1989), *aff'd* 905 F.2d 571 (2nd Cir. 1990). Although the Utah Supreme Court in *Perank, supra,* n.3, cited *Mendoza* and *Hercules Carriers, supra,* the Utah Supreme Court did not adopt *Mendoza*'s holding, or state that it was prepared to hold that parties cannot use collateral estoppel against the State of Utah.



As stated below, the ruling in *Mendoza* does not apply to prevent Mr. Hagen's defense of collateral estoppel. This Court limited its holding in *Mendoza* to "issues such as those involved in this case." *Mendoza,* 464 U.S. at 162. The collateral estoppel issue in *Mendoza* was that the United States, in the circumstances relevant to the *Mendoza* case, had violated the guarantee of Due Process under the Fifth Amendment to the United States Constitution. Thus, the narrowest reading of the holding is that it reaches only issues of Fifth Amendment Due Process. However, the following passage, in particular, from the policy discussion in *Mendoza* suggests that the Court desired to encompass significant public issues which affect citizens throughout the land:

> Government litigation frequently involves *legal questions of substantial public importance;* indeed, because the *proscriptions of the United States Constitution* are so generally directed at governmental action, many *constitutional questions* can arise only in the context of litigation to which the Government is a party. Because of those facts the Government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.
>
> A rule allowing collateral estoppel against the Government in such cases would substantially thwart the development of *important questions of law* by freezing the first final decision rendered on the particular legal issue. Allowing

> only one final adjudication would deprive this Court of the *benefit it receives from permitting several courts of appeals to explore a difficult question* before this Court grants certiorari.

*Id.* at 160 [emphasis supplied]

Because the collateral estoppel issue in Mr. Hagen's dispute involves fact-specific determinations of site-specific federal statutes and federal conduct addressing federal Indian policy ninety years ago in remote and isolated northeast Utah, the policies expressed in *Mendoza* do not apply.

Moreover, the *Mendoza* opinion expressly permits collateral estoppel against the Government if there is mutuality. *Mendoza*, 464 U.S. at 163-164. "The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Bernhard v. Bank of America National Trust and Savings Assoc.*, 122 P.2d 892, 894 (Cal. 1942) (Traynor, J.). Mr. Hagen believes there can be little, if any, doubt that had the *Ute Tribe en banc* case resulted in the disestablishment of the Uintah Valley Reservation, he would have been bound by that decision. He, like other Indians, would have been the subject of state prosecution for actions alleged to have been committed off trust lands.[10] Federal and tribal jurisdiction would have been confirmed over Indian involvement in alleged events taking place on trust lands. Therefore, Mr. Hagen has mutuality in the instant case, and the State of Utah cannot be shielded by *Mendoza*.

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[10] The State of Utah, having brought Mr. Hagen to trial in its courts on the presumption that the *Ute Tribe en banc* decision was wrong, would obviously have been pleased to prosecute him in light of a decision by the federal courts issued in Utah's favor.



### G. No Exceptions Prevent Mr. Hagen from Applying the Rule of Collateral Estoppel Against the State of Utah.

In appropriate cases, exceptions to the rule of collateral estoppel may prevent application of the rule. The Court addressed the two most important exceptions in *Montana, supra*: 1) "whether controlling facts . . . have changed significantly since the . . . [first] judgment," *Id.* at 155; and, 2) "whether controlling . . . legal principles have changed significantly since the . . . [first] judgment," *Id.*

#### 1. Controlling Facts Have Not Changed.

Those facts necessary to decide the boundary of the Uintah Valley Reservation derive from *Ute Tribe District Ct.* From the time the district court developed the factual record to the time Mr. Hagen's right to raise collateral estoppel on the boundary issue ripened, those facts did not change. Moreover, they have not changed to date. From immediately after the district court's rulings, the State vouched for the completeness and accuracy of the factual record.[11] As noted, *supra*, the State was instrumental in appending virtually the entire federal district court record to *Perank*, and ultimately to *Hagen*, and asserted no significant change in the facts. Thus, the "change of facts" exception is inapplicable in Mr. Hagen's case.

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[11] A striking example of this is found on pages 2 and 3 of Utah's Tenth Circuit opening brief in the appeal from the District Court's decision: "The ultimate determination of the [district] court [ ] that . . . the Uintah Reservation was not disestablished . . . was carefully reached after a deliberate and painstaking evaluation of thousands of pages of documents, after weighing the testimony of witnesses, after examining maps and photographs, and then by placing this giant mosaic of law and fact into historical and practical perspective."

### 2. Controlling Legal Principles Have Not Changed.

The controlling legal principles necessary to determine the Uintah Valley Reservation boundary issue are those this Court has set out in its line of reservation diminishment or disestablishment cases construing various surplus land acts of nearly a century ago. *See, e.g., Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); and *Solem v. Bartlett*, 465 U.S. 463 (1984). *Ute Tribe en banc* considered all of this precedent.[12] No controlling authority has emerged since 1986.

On the basis of the above showings, Mr. Hagen requests the Court to find that collateral estoppel applied against the State of Utah and find that Utah's courts should have dismissed Mr. Hagen's case for lack of subject matter jurisdiction. Mr. Hagen, therefore, also requests this Court to reverse the Utah Supreme Court, and dismiss his case with prejudice.

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[12] Listen again to the words of the State of Utah presented to the federal courts eight years ago: "[I]t is virtually impossible for any party to present a persuasive argument to show that the district court committed reversible error. [ ] [and] the court was sensitive and obedient to all relevant guidance by the decisions of the U.S. Supreme Court." Opening Brief of State of Utah, on appeal to the Tenth Circuit in *Ute Indian Tribe v. Utah*, pp. 2-3.



## II. BY SUBMERGING MR. HAGEN'S CRIMINAL APPEAL INTO THE APPEAL OF MR. PERANK, AND, THEREBY, FAILING TO ADJUDICATE MR. HAGEN'S COLLATERAL ESTOPPEL DEFENSE, THE UTAH SUPREME COURT VIOLATED MR. HAGEN'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND ASSISTANCE OF COUNSEL.

Mr. Hagen asserts that the State of Utah violated two of his constitutionally guaranteed rights by a single action, namely the Supreme Court's refusal to adjudicate his important defense of collateral estoppel of the Uintah Valley Reservation boundary issue. Since the facts and procedures underlying both violations are the same, Mr. Hagen has combined the analysis of these issues to promote efficiency.

### A. Mr. Hagen's Fourteenth Amendment Due Process Rights Were Violated by the Utah Supreme Court's Submergence of His Appeal.

To ensure a defendant "meaningful access to justice," not "mere access to the courthouse doors," *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), the Court has long recognized that "due process of law . . . embraces the fundamental conception of a fair trial, with opportunity to be heard." *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting) and that "failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "The hearing, moreover, must be a real one, not a sham or a pretense." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); *Moore v. Dempsey*, 261 U.S. 86 (1923); *Mooney v. Holohan*, 294 U.S. 87 (1935).

When a State, as Utah here, undeniably has established its appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. People of the State of Illinois*, 351 U.S. 12, 18 (1956), "the procedures used in deciding appeals must comport with

the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. at 387, 393 (1985). Moreover, "where its action has significant discretionary elements . . . [the State] must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Evitts*, 469 U.S. at 401. The State may not decide an appeal "in a way that . . . [is] arbitrary with respect to the issues involved." *Evitts*, 469 U.S. at 404.

A fundamental element of due process is the right of a defendant charged with a crime to establish a defense. *Washington v. Texas*, 388 U.S. 14, 19 (1967). This right is not simply a generalized right; "rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due." *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

Mr. Hagen avers that his right to due process under the Fourteenth Amendment has been violated. While Utah permits a litigant to attack subject matter jurisdiction at any time, *Glasmann v. Second District Court*, 12 P.2d 361, 363 (Utah 1932), that right was taken away from Mr. Hagen through the coupling of his appeal with, and the submergence of his appeal into, that of Mr. Perank. Because under Utah law, Mr. Hagen has the right to appeal his conviction to the State Supreme Court, his right to challenge subject matter jurisdiction included the right to make that challenge before the Supreme Court. Moreover, in challenging the power of the State of Utah over him, Mr. Hagen under Utah law was empowered to assert collateral estoppel as a defense. *Perank, supra*, n.3. The Utah Supreme Court's refusal to consider Mr. Hagen's jurisdictional defense is particularly egregious: 1) given the fact that the Utah Court of Appeals had expressly ruled that Utah courts did not have jurisdiction on the basis of collateral estoppel of the jurisdictional predicate; 2) given



the fact that it was the State which appealed Utah's Court of Appeals decision, haled Mr. Hagen into the Utah Supreme Court, and sought reversal of the Court of Appeals on the collateral estoppel issue; and, 3) given the fact that the Utah Supreme Court had discretion to refuse the State's petition for certiorari, and knew it had the *Perank* case before it at the time.

Not satisfied with denying Mr. Hagen his state law right to attack its jurisdiction and to use collateral estoppel in that attack, the Supreme Court of Utah then submerged Mr. Hagen's appeal in *Perank* – a case where the court could say, with a straight face, that Clint Perank had never asserted the *res judicata* (or collateral estoppel) effect of the federal court's decision in the *Ute Tribe* cases. *Perank, supra*, n.3.

The Utah Supreme Court's "extraordinary machinations" to resist federal law, *see, Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 696, n.36 (1979), as described here, deprived Mr. Hagen of a fair hearing and of the minimal standards of due process. As a result, Mr. Hagen's appeal should be dismissed.

### B. Mr. Hagen's Sixth Amendment Right to Assistance of Counsel was Violated by the Utah Supreme Court's Submergence of His Appeal.

Mr. Hagen's right to the assistance of counsel under the Sixth Amendment to the United States Constitution, as applied to the States under the Fourteenth Amendment, *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Herring v. New York*, 422 U.S. 852 (1975), "is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). It applies both to appointed and retained counsel, *Johnson v. Zerbst*, 304 U.S. 458 (1938), *Cuyler v. Sullivan*, 446 U.S. 335 (1980), whether in the context of trial or on appeal. *Evitts, supra*. The right exists "not for its own sake, but

because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984), *Lockhart v. Fretwell*, ___ U.S. ___, 113 S.Ct. 838, 842 (1993).

The meaning of the right to the effective assistance of counsel rests in its ability to ensure that the defense has "the opportunity to participate fully and fairly in the adversary . . . process." *Herring*, 422 U.S. at 858. The process must retain its character as a "confrontation between adversaries," or the right to effective assistance of counsel is violated. *Cronic*, 466 U.S. at 657.

A court must guard this right, *Glasser v. United States*, 315 U.S. 60, 71 (1942), along with the defendant's other constitutional rights, and must not, itself, infringe these rights. *United States v. Thompson*, 827 F.2d 1254, 1258 (9th Cir. 1987).

In Mr. Hagen's appeal, his Sixth Amendment guarantee to competent representation was undermined by the very same submergence of appeals, discussed above, that gives rise to his due process violations. Very simply, Mr. Hagen's principal defense, prepared by his counsel, was that collateral estoppel applied to defeat the subject matter jurisdiction of the Utah courts. The "submergence" of Mr. Hagen's appeal vitiated the strategy of Mr. Hagen's counsel in violation of the obligation of the Utah courts to uphold the right to effective assistance of counsel.[13]

To conclude, the coupling of the *Hagen* and *Perank* appeals as handled by the Utah Supreme Court raises

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[13] Wholly independent of the affirmative conduct of the Utah Supreme Court, is the observation of its dissenting justice, Justice Zimmerman, who expressed in unequivocal terms the "unequal and inadequate briefing of the boundary issue" as presented to the court in *Perank, supra*, where the Utah Supreme Court chose to litigate the boundary.



serious questions about the judicial temperament and integrity of the appeals apparatus in the State of Utah, as applied to Mr. Hagen. It has deprived him of his validly asserted, meritorious collateral estoppel defense. For that reason, Mr. Hagen requests the Court to reverse the Utah Supreme Court and dismiss this case with prejudice, on the basis that the Supreme Court of Utah violated Mr. Hagen's rights to due process and effective assistance of counsel under the Fourteenth and Sixth Amendments to the United States Constitution.

## III. THE UTAH SUPREME COURT IMPROPERLY DECIDED THE UINTAH VALLEY RESERVATION BOUNDARY ISSUE: THE UINTAH VALLEY RESERVATION REMAINS INTACT – AS A RESULT, INDIANS WITHIN ITS BOUNDARIES ARE SUBJECT TO FEDERAL AND TRIBAL GOVERNMENT AUTHORITY, NOT STATE LAW.

If the Court upholds the State of Utah Supreme Court decision of July 17, 1992, then the State of Utah and its subdivisions will exercise general civil and criminal jurisdiction over Indians whenever they are located off trust lands. On the other hand, if the Uintah Valley Reservation is held to be intact, then Utah and its subdivisions will have jurisdiction over nonIndians and the United States and the Ute Indian Tribe will exercise jurisdiction over Indians.

The Court is not being asked to rule on any questions relating to Ute Tribal property rights within the Uintah Valley Reservation. This is a jurisdictional dispute.[14] That

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[14] Moreover, this is a dispute focused on the jurisdictional rights of Indians. NonIndians are largely unaffected by disestablishment issues given the Court's holdings severely limiting

such a dispute requires the attention of the Court, 88 years after the Reservation was opened in 1905 arises because the surplus land statutes opening the Uintah Valley Reservation focused on changes in land tenure and did not address the boundary or jurisdictional issue. *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).

### A. The Court's Rule for Determining Whether an Indian Reservation Remains Intact Is Settled and Straightforward – a State Must Demonstrate that Congress "Clearly" Intended to Remove Boundaries; Not Merely to Permit non-Indian Ownership of Reservation Lands.

#### 1. A "Clear" Intent to Remove Boundaries Must Be Shown.

In *Solem* the Court confirmed that two alternative tests exist to determine whether Congress intended diminishment, and cautioned that under either test: "diminishment . . . will not be lightly inferred. Our analysis of surplus land Acts requires that Congress clearly evince an 'intent to change boundaries' before diminishment will be found." *Solem*, 465 U.S. at 470. The first test

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federal and tribal authority over nonIndians living on fee lands within Indian Reservations. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) the Court ruled that the Tribes cannot assert criminal jurisdiction over nonIndians. In *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), the Court confirmed that on reservations, federal and tribal civil authority over nonIndians located on fee lands is significantly limited. With respect to such persons, the Tribe has no power to exclude and can assert civil authority only in rare situations where the nonIndian activity would, cause "demonstrably serious" impact which imperils "the political integrity, economic security or the health and welfare of the tribe." *Brendale, supra*, at 431.



focuses on the statutory language used to open the Indian lands. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* When such language is coupled with an unconditional promise by the United States to pay a sum certain for the lands, there is created an "almost insurmountable presumption" that Congress intended to diminish the reservation. *Id.*

In the alternative (in the absence of such explicit statutory language) the Court must look to surrounding events – "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress," *Solem*, 465 U.S. at 471, to see whether such events "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation."[15] *Id.*

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[15] In the event the Court can "unequivocally" find such a widely-held contemporaneous understanding the Court has been "willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged." *Id.* In effect, congressional intent is to be gleaned from an examination of what the Indians understood was occurring. This rule of statutory construction, like the rule that statutes are to be construed to favor Indians and as the Indians would have understood them *Choate v. Trapp*, 224 U.S. 665, 675 (1912), *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970), represents an acknowledgment by the Court of the unequal bargaining position of the parties, based on the superior negotiating skills and knowledge of the language on the part of representatives of the United States. *See Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979).

As a subpart to this surrounding-circumstances approach, the Court has looked to post-opening congressional, administrative, judicial, and demographic facts as "lesser" clues as to what Congress intended to accomplish. *Solem*, 465 U.S. at 471-472.

Under either test the burden of persuasion and of proof lies with those seeking to find diminishment – here, the State of Utah.

### 2. Boundaries Are Not Abolished When Indians and NonIndians Are Encouraged to Live Side by Side.

Before examining the particulars of the opening of the Uintah Valley Reservation, it will be helpful to review briefly the Court's five disestablishment cases. Those cases, in order of decision, are: *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); and, *Solem v. Bartlett*, 465 U.S. 463 (1984).

Of these cases, only *Rosebud* considered an opening of a reservation where Congress did not intend Indians and nonIndians to live side by side thereafter. To the contrary, in *Rosebud* the reservation was divided into a nonIndian enclave and an Indian enclave.[16] That fact played a significant role in the Court's conclusion that the Indians had intended to surrender all of their interest in the lands at issue. Each of the other four cases involved implementation, by specific act, of the general allotment

[16] As the Court noted, the Indians in *Rosebud* understood that "[t]he cession of Gregory County . . . will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." *Rosebud*, 430 U.S at 591-92.



policies widespread in the Nineteenth Century. Those policies, well known to the Court, allotted some of the reservation lands to the resident Indians and opened the unallotted lands to nonIndians "with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways." *Mattz*, 412 U.S. at 496. Of the cases which implemented Congress's plan of "promoting interaction between the races and of encouraging Indians to adopt white ways," only one was found to have diminished the reservation in question. That conclusion was reached in *DeCoteau*, 420 U.S. at 446, because the Court found, in light of the unqualified language of Reservation surrender in an 1889 agreement, that the Indians and the United States both were satisfied that the mere retention of allotments, rather than the retention of the reservation boundary, would provide an adequate "fulcrum for tribal affairs."[17]

All this makes common sense. The Court, in effect, requires a showing, by clear and convincing evidence, that Indians have renounced all interest in reservation lands. Except in *DeCoteau*, the Court has found that showing impossible to achieve when allotment Act policies have been implemented to have Indians and nonIndians live on reservation land side by side.

At the same time, the Court has had no problem finding such a renunciation when the plan of the Indians

[17] The agreement of December, 1889, which was found to have "effected a simple and unqualified cession of all of the unallotted lands to the United States for a sum certain" provided that the Indians shall "cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation . . . remaining after the allotments. . . . " *DeCoteau*, 420 U.S. at 437-38, and 456.

and the Congress was to sever an identifiable block of reservation lands from the Indians' ownership and control. For example, in the case of the Colville Indian Reservation, the Court found that the north half of the original reservation had been diminished because Congress stated that it "be vacated and restored to the public domain." *Seymour, supra,* at 355-56. There was no plan that the north half be settled so that Indians and nonIndians could live side by side. Similarly, in *Mattz,* the court noted two other boundary disestablishment acts which ordered identifiable blocks of Indian land to be severed from Indian control: 15 Stat. 198, 221 (1868), which provided that the "Smith River Reservation is hereby discontinued," *Mattz,* 412 U.S. at 505, n.22; and 33 Stat. 218 (1904), "the reservation lines of the said Ponca and Oto and Missouria Indian Reservations be, and the same are hereby, abolished." *Id.* Then, in *Rosebud,* the Court found that 25 Stat. 896, § 21 (1889), created six separate Sioux Reservations out of the 25,000,000 acre Great Sioux Reservation and at the same time ceded to nonIndians a separate and specifically identifiable parcel. *Rosebud,* 430 U.S. at 589.[18]

### B. The Opening of the Uintah Valley Reservation focused on homestead entry: No hard evidence exists to show a total surrender of all Tribal interests.

The relevant language of the Act of March 3, 1905, 33 Stat. 1048, 1069-70, under which the Uintah Valley Reservation was opened to nonIndian settlement provides:

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[18] In contrast, in the Uintah Valley Reservation at the 1905 opening, Indian-owned lands were dispersed in the Reservation and the identification of nonIndian ownership awaited the selection process authorized under the homestead and townsite entry laws.



> That the said unallotted lands . . . *shall be disposed of under the general provisions of the homestead and townsite laws of the United States,* and shall be opened to settlement and entry by proclamation of the President. . . . [Emphasis added.]

#### 1. An analysis of the 1905 Act Shows That it Was Designed to Place Indians and NonIndians Side by Side.

Utilizing the standards set out in *Solem,* it is apparent that the 1905 Act fails to include any language of cession or words "evidencing the present and total surrender of all tribal interests." *Solem,* 465 U.S. at 470. In *Rosebud,* 430 U.S. at 597, and in *DeCoteau,* 420 U.S. at 445, the Court, in determining that the reservations in question had been disestablished, relied heavily upon express language of cession which it found to be "precisely suited" to disestablishment.

The cession language regarding the Rosebud Reservation authorized the Indians to "cede, surrender, grant and convey to the United States all their claim, right, title, and interest in and to" the land in question. *Rosebud,* 430 U.S. at 591, n.8. Furthermore, in *Rosebud,* the Court confirmed that the mere opening of the reservation to settlement (as we read that 1905 Act to contemplate) does not mean that the area has lost its reservation status. *Rosebud,* 430 U.S. at 586-587. The 1905 Act related to the Uintah Valley Reservation did not provide for the cession of all Indian interests. Rather, it limited the sale of unallotted lands to entries under homestead and townsite laws.

Finally, the 1905 Act expressly provided the method by which the Ute Indians would receive payment for the unallotted lands sold to nonIndian settlers after the opening of the Reservation. The Indians were to receive "[t]he

proceeds of the sale" of the surplus lands as opposed to a sum certain. The Court has concluded that a sum certain provision was consistent with an intent to terminate the reservation, *DeCoteau*, 420 U.S. at 448, and that an uncertain future proceeds provision dependent upon actual settler purchases of reservation lands is evidence of no diminishment. *Solem*, 465 U.S. at 473, *Mattz*, 412 U.S. at 503-504.[19]. In light of this analysis, it is not surprising that 12 years ago the federal courts in Utah concluded in an 85-page exhaustive analysis that, "Nothing in the legislative history of the 1905 Act *approaches* a clear expression of congressional intent to disestablish the Uintah Reservation . . . " *Ute Tribe District Ct.*, 521 F.Supp. at 1132 [emphasis supplied].[20]

Moreover, a review of Congress' actions leading up to the 1905 Act reveals no acceptance by the Ute Indians of a plan to surrender all of their interests in the Uintah Valley Reservation and to vacate it to nonIndians. A predecessor act, the Act of May 27, 1902, 32 Stat. 245, 263-64, provided that the Secretary of the Interior, with the consent of a majority of the adult male Indians should provide allotments and should restore all unallotted

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[19] In *Ash Sheep Co. v. United States*, 252 U.S. 159, 166 (1920), the Court held that this "installment" method of payment assured that Indians retained the beneficial title of the unsold land.

[20] After the *Ute Tribe District Ct.* case had concluded, and in its initial responsive brief to the Tenth Circuit in the Ute Tribe's appeal, the State could find little fault with the District Court on the Uintah Valley Reservation: "It is virtually impossible for any party to present a persuasive argument to show that the district court committed reversible error . . . [and] the court was sensitive and obedient to all relevant guidance by the U.S. Supreme Court." Opening Brief, State of Utah, on appeal to Tenth Circuit in *Ute Indian Tribe v. Utah*, p. 2-3.



lands to the public domain. The 1902 Act was amended by the Act of March 3, 1903, 32 Stat. 982, 997-998, which extended the time for opening the Reservation and instructed the Secretary of Interior to send an inspector to obtain the consent of the Utes, but provided that if no consent could be obtained the lands should nevertheless be allotted and the reservation opened.[21]

Because the allotment and opening process was not proceeding on the original time schedule, Congress moved again to have the Uintah Valley Reservation allotted and opened. On March 3, 1905, 33 Stat. 1048, 1069, Congress provided that the unallotted lands should be disposed of under the general provisions of the homestead and townsite laws of the United States and should be opened to settlement and entry by proclamation of the President.

The statutory sequence, summarized above, shows that from 1902 to 1905 Congress delayed the opening, removed the requirement of Indian consent and instructed the Secretary to open the unallotted lands to homestead and townsite entry only, rather than returning the unallotted lands of the reservation to the public domain. The plan selected by Congress to ultimately open the Uintah Valley Reservation lacked the two critical characteristics found by the Court to have accomplished a reservation extinguishment.

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[21] The change in the 1903 Act as it relates to obtaining Indian consent occurred as a result of the January 5, 1903 decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) where the Supreme Court confirmed that Congress possessed the power to unilaterally extinguish Indian reservations. Congress subsequently extended the time for opening the reservation a second time until March 10, 1905. Act of April 21, 1904, 33 Stat. 189, 207-208.

First, none of the Uintah statutes include express language of cession and sale found to be of critical importance by the Supreme Court in *DeCoteau* and *Rosebud*. For example, in *DeCoteau*, 420 U.S. at 437, Congress ratified an agreement voluntarily entered into by the Indians which provided that:

> [T]he Indians cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation remaining after the allotments. . . .

Similarly in *Rosebud*, 430 U.S. at 597, the Congress enacted a 1904 Act implementing the principal terms of a 1901 Agreement between the Indians and the United States. The 1904 Act, 33 Stat. 256, provided:

> The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, . . . .

Second, the Uintah statutes did not vacate the reservation to the public domain prior to permitting entry under the public land laws. For example, in *Seymour* the Court considered two acts of Congress one of which "*vacated* and restored to the public domain" a portion of the Colville Indian Reservation. *Seymour*, 368 U.S. at 354 [emphasis added]. In fact, the language selected by Congress, in the setting of the Uintah Valley Reservation, uses the same language found by the Court and numerous courts of appeal *not* to have disestablished reservations. Thus, in *Seymour* the Court concluded that the words "such surplus lands shall be open to settlement and entry under the provisions of the homestead laws" together with a separate phrase authorizing townsite selection



"did no more than open the way for non-Indian settlers to own land on the reservation." *Seymour*, 368 U.S. at 356. Similarly, in *Mattz* the Court determined that limiting entry to homesteaders does "not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation." *Mattz*, 412 U.S. at 497.[22]

Support for the conclusion that Congress only planned to implement allotment Act policies and did not plan to have the Ute Indians vacate the Uintah Valley Reservation emerges from the fact that when the 1905 bill

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[22] The State of Utah keeps trying, without success, to sell the federal courts on the hypothesis that the predecessor 1902 Act, simply because it included the phrase "restored to the public domain," established a baseline intent to disestablish which was carried forward in the 1905 Act which actually opened the Reservation. As shown, *infra*, after *Solem* no basis exists to support a theory of baseline intent arising solely out of the words "public domain." Also in the present appeal there is no basis for applying the concept of carried intent, because in contrast to *Rosebud* where carried intent was utilized: (a) the parties do not agree that the Congressional intent of the 1902 and 1905 statutes is identical as the parties agreed in *Rosebud;* (b) there is no evidence of a continuing willingness by the Ute Indians to cede their lands as there was in *Rosebud;* and (c) there exists no legislative history showing a congressional understanding that the Uintah Valley Reservation was being reduced in size through the opening process as there was in *Rosebud*. In *Rosebud:* all parties agreed that the substance and intent of the various statutes making up the carried intent were the same, *Rosebud*, 430 U.S. at 606; a majority of the Sioux Indians agreed to each of the three separate diminishments reflected in the statutes; and the legislative history of the three acts repeatedly referred to the Rosebud Reservation as being a reduced size after the lands to be opened were removed from it. *Rosebud*, 430 U.S. at 608-612. Significantly, the Court of Appeals for the Ninth Circuit has refused to accept an argument of "carried intent," finding it to be "mere speculation." *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 958 (9th Cir. 1982).

reached the Senate, the Senate Committee on Indian Affairs deleted reference to Uintah Valley lands being returned to the "public domain" and limited entry by nonIndians to the homestead and townsite laws to assure that Indians and nonIndians would live side by side. *Indian Appropriations Bill for 1905-06,: Hearings on H.R. 17474 Before the Senate Subcom. on Indian Affairs,* 58th Cong. 3d Sess. (1905). Further, when the full senate considered the bill, the House's version containing "public domain" language was stricken, and the substitute language regarding the homestead and townsite laws was included. 39 Cong.Rec. 3522 (Feb. 27, 1905). Subsequently, the bill was enacted limiting the disposal of the surplus lands to settlers under the homestead and townsite laws only.[23]

**2. The Surrounding Circumstances Show No Plan By the Ute Indians to Vacate their Reservation to NonIndians.**

Furthermore, Utah has not shown, and cannot show, that the manner in which the opening of the Uintah Valley Reservation was negotiated with the Ute Indians

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[23] Further support for the proposition that Congress did not intend to disestablish the Uintah Valley Reservation is found by reviewing the comments of Representative Howell of Utah on the floor of the House. In discussing the 1905 Bill which sought to open the Reservation, he repeatedly emphasized the fact that the proposed opening would benefit the Indians by giving them more contact with nonIndian settlers. 39 Cong.Rec. 1181-1182 (1905). Thus, "[t]he Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Mattz, supra,* at 497; *Seymour, supra,* at 356.



and the tenor of the legislative reports presented to Congress during the period 1902-05 "unequivocally reveal a widely-held contemporaneous understanding that the affected reservation would shrink" as required by *Solem,* 465 U.S. at 471.

The most compelling evidence of a complete absence of a "widely-held contemporaneous understanding that the affected reservation would shrink" comes from the views of the Ute Indians, reported to Congress by Inspector McLaughlin, the very same federal official who successfully obtained the consent of the Sioux Indians to diminishment in *DeCoteau* and *Rosebud.* Compare the following reported understanding of the Indians:

**Viewpoints of the Sioux Indians relied on by the Supreme Court in *DeCoteau* and *Rosebud***

We never thought to keep this reservation for our lifetime. *DeCoteau,* 420 U.S. at 433.

We don't expect to keep reservation. *Id.*

We can buy for ourselves what we need if payment is made in cash, and then we do not care to have an agency here after the surplus lands have been sold. The people have asked me to say this as their wish.

This little reservation is ours, and all we have left. There is nothing in our treaty that says we must sell. It was given us as a permanent home, but now we have decided to sell . . . *DeCoteau,* 420 U.S. at 435, n.16.

In *Rosebud* the Supreme Court noted that the 1904 and 1907 diminishment acts had the written consent of a majority of Indians and the 1910 diminishment act had in the words of Inspector McLaughlin the "practically unanimous concurrence" of the Indians.

*Rosebud,* 430 U.S. at 589, n.2, and at 610

**Viewpoint of the Ute Indians**

1. 1899 letter to Commissioner of Indian Affairs.

*The Indians were unanimous and determined in their opposition to making cession to the government of any of their lands* and to allowing an Uintah or White River Indian to take and hold an allotment in severalty on said reservation. *Ute Indian Tribe v. Utah*, 521 F. Supp. at 1113. [emphasis supplied]

2. 1898 Statement of Ute Delegation to Washington, D.C. *Our land is small and we do not want to sell it to anyone.* We do not want any commission sent there; we are opposed to that. We have no more land than we want ourselves for our own use. *Id.* [emphasis supplied]

3. 1902 Statement to Congress by Indian Affairs Commissioner. There is a sort of feeling among the ignorant Indians that they do not want to lose any of their land. That is all there is to it; and I think before you can get them to agree to open the reservation, you have got to use some arbitrary means to open the land. *Ute Indian Tribe*, 521 F.Supp. at 1114.

4. 1903 Report of Inspector McLaughlin to Secretary of Interior on his failure to get even 30% of the Utes to consent to a sale of their lands.

I deemed it proper to transmit the same, but with the explanation that the signers were as much opposed to the opening of the reservation without consulting the Indians as the non-signers were, but they thus expressed their acceptance of the law to show their good will and readiness to comply with the wishes of the Government. *Ute Indian Tribe*, 521 F.Supp. at 1118.



Obviously, this comparison confirms that the Ute Indians, unlike the Rosebud Sioux (*Rosebud, supra*) and the Sisseton-Wahpeton Sioux (*DeCoteau, supra*) were unwilling to abandon and vacate the Uintah Valley Reservation. To the contrary, they were reluctant to have non-Indians settle at all on the Reservation lands.[24]

### C. The Post Opening Facts Do Not Show a Plan to Renounce All Indian Interests in the Uintah Valley Reservation.

The post opening congressional, administrative, judicial, and demographic facts, which are to be looked to as lesser clues of what Congress intended to accomplish, *Solem*, 465 U.S. at 471-72, also fail to show a "clear" intent to diminish. After the opening, Congress used various phrases to describe the Uintah Valley Reservation – some in the present tense, others in the past tense. The Department of the Interior did the same. *See Ute Indian Tribe v.*

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[24] The Utah Supreme Court improperly analyzes a portion of the 1903 *McLaughlin* report as evidence of an intent to surrender the Reservation boundary. *Perank*, 19 ILR at 5198-5199. In his report, McLaughlin states he told the Utes that after Congress' plan was finished they *each* "will have a boundary to your individual holdings." On their face, McLaughlin's comments address title. While, in 1903 individual allotment title could convey jurisdictional implications, it is clear today that individual allotment title is no longer relevant to the determination of Indian Country. *See*, 18 U.S.C. § 1151 and *Oklahoma Tax Commission v. Sac & Fox Nation*, No. 92-259, 113 S. Ct. ___, (1993) Importantly, McLaughlin who had successfully negotiated the Sioux voluntary cessions analyzed in *DeCoteau* and *Rosebud*, was honest in reporting his failure to obtain an Indian cession in Utah. As he reported, the Indians were "unanimously opposed to the opening of their reservation." *Ute Indian Tribe*, 521 F.Supp. at 1118.

*Utah*, 521 F.Supp. at 1142, n.191. More importantly, however, the Secretary of the Interior restored much of the unallotted acreage, which over the years had remained unentered, to the Uintah Valley Reservation. On August 25, 1945, Interior Secretary Ickes issued an order of restoration which included:

> [S]aid lands are hereby restored to tribal ownership for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah and *are added to and made a part of the existing reservation*. . . . [25]

*Ute Indian Tribe v. Utah*, 521 F.Supp. at 1143.

Utah contends that an earlier administrative document confirms that the Uintah Valley Reservation was diminished. It relies on the Presidential Proclamation of July 14, 1905, 34 Stat. 3119, reprinted at 521 F.Supp. at 1174-1177, which triggered the opening of Indian lands authorized by Congress under the 1905 Act. The Proclamation at one point refers to the predecessor 1902 Act which proposed to return Reservation lands to 'public domain. More importantly, the operative part of the Proclamation (quoted below) makes an explicit reference to the Reservation as still in existence and to the fact that entry would be limited (as provided for in 1905 Act) to only homestead and townsites.

> Now, therefore, I, Theodore Roosevelt . . . do hereby declare and make known *that all the unallotted lands in said reservation* . . . will on and after the 28th day of August, 1905, . . . *be opened*

[25] The expression "added to and made a part of the existing reservation" in the order of restoration issued pursuant to the Indian Reorganization Act is fully consistent with the Supreme Court's finding in *Mattz* that restoration to tribal ownership of vacant and undisposed-of lands is evidence of continued reservation status. *Mattz*, 412 U.S. at 505.



> *to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States*. . . . [emphasis added]

When this Proclamation is contrasted with the Proclamation relied on by the Supreme Court in *Rosebud*, several observations are apparent. First, the Proclamation in *Rosebud*, 430 U.S. at 602, did not recite various unilateral opening acts of Congress (only one of which used the phrase, "public domain"); rather the Proclamation expressly referred to the written cession and relinquishment of Indian interests in the Reservation lands:

> Whereas by an agreement between the Sioux tribe of Indians on the Rosebud Reservation, in the State of South Dakota, on the one part, and James McLaughlin, a United States Indian Inspector, on the other part, amended and ratified by act of Congress . . . the said Indian tribe ceded, conveyed, transferred, relinquished, and surrendered, forever and absolutely, without any reservation whatsoever, expressed or implied, unto the United States of America, all their claim, title and interest of every kind and character in and to the unallotted lands embraced in the following described tract of country now in the State of South Dakota, . . .

Second, in contrast to the Uintah Proclamation where the President described the lands to be entered as "all the unallotted lands in said reservation," in *Rosebud* the President described the opened lands very differently, as "all of the lands so as aforesaid ceded." *Id.* In Mr. Hagen's view, while the *Rosebud* Proclamation is undoubtedly an "unambiguous contemporaneous, statement, . . . of a perceived disestablishment" *Rosebud*, 430 U.S. at 602-603, the Uintah Proclamation is an equally unambiguous and

contemporaneous acknowledgment that the Uintah Valley Reservation survived intact the opening Act, the Act of March 3, 1905.[26]

Finally, the post-opening history of the Uintah Valley Reservation includes overlapping evidence of federal/tribal assertions and of state prosecutions. In the words of the Utah federal courts: "One thing is certain: the jurisdictional history of the Uintah and Ouray Reservation is not one of 'unquestioned' exercise of state authority." *Ute Indian Tribe v. Utah*, 521 F. Supp. at 1146.

While the analysis of post-opening evidence could extend for pages, it is apparent that once the State of Utah's contention that the phrase "public domain" created a 1902 baseline intent which was carried forward to the 1905 opening act, is set aside as inconclusive, virtually no evidence remains which approaches the Supreme Court's threshold to find diminishment:

> There are, of course, limits to how far we will go to decipher Congress intention in any particular surplus land Act. When both an Act and its legislative history fail to provide *substantial and compelling evidence* of a congressional intention to diminish Indian lands, we are bound by our

[26] Because Mr. Hagen does not believe the phrase "public domain," in and of itself, establishes a *prima facie* case of diminishment, he attaches little significance to the fact that President Roosevelt's Proclamation references both the 1902 Act and the 1905 Act. In Mr. Hagen's view, the significant portion of the Proclamation lies in the operative phrase "the unallotted lands . . . will be opened to entry, settlement, and disposition under the general provisions of the homestead and townsite laws. . . ." As noted earlier, this language is virtually identical to the opening language, "all of the lands . . . are hereby declared to be subject to settlement, entry and purchase" found not to have diminished a Reservation in *Mattz*, 412 U.S. at 495-96.



> traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening [emphasis added] *Solem*, 465 U.S. at 472.

Accordingly, we now turn to the theme of the State of Utah that the words "public domain," when appearing in an opening act, conclusively establish an intent to diminish.

### D. Utah's Reliance on Public Domain Language Is not Sufficient to Show a Clear Intent to Disestablish.

The Court in *Solem* nine years ago held that use of the words "public domain" does not, in and of itself, constitute clear congressional intent to diminish. Rather, the words are mere evidence of a congressional understanding that the Indian lands would be available for settlement and that the boundaries *may* have been diminished, *Solem*, 465 U.S. at 475, but the words as a matter of law do not "carry the burden of establishing an express congressional purpose to diminish." *Id.*[27]

Moreover, this finding in *Solem* is consistent with what the Court has observed about the phrase "public domain" in earlier cases. The Court has never determined

[27] Indeed, in *Solem* the Court found no diminishment even where the opening statute contained the phrase, "within the respective reservations thus diminished" as well as the phrase "part of the public domain." *Solem*, 465 U.S. at 474-75. Before *Solem*, the Eight Circuit had concluded that the phrase "as diminished" is ambiguous insofar as it could either relate to the reduction in Indian land holdings or to a change in boundaries, and does not demonstrate a clear congressional intent to disestablish the reservation boundaries. *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809, 820 (8th Cir. 1983).

that the words "restore to the public domain" in and of themselves are evidence of diminishment. Utah continues to make this argument, but it is wrong. Indeed, Utah and its counties were finally rebuffed in *Solem*, itself. In that decision, the Court referred specifically to the Utah Counties of Duchesne and Uintah as *amici curiae* who unsuccessfully argued before the Court that the presence of the words "public domain," in and of itself, demonstrates diminishment. *Id.*, n.16.

What the Court said prior to *Solem* about the legal meaning of "public domain" has always been a passing reference and never definitive.

For example, in *DeCoteau*, 420 U.S. at 446, the Court observed:

> That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much.

But this quote does not tell us what aspects of the "other agreements," taken separately or together, stripped the lands of reservation status, and it is entirely unfair (and inaccurate after *Solem*) for Utah to contend that restoring Indian lands to the public domain in and of itself extinguishes a reservation boundary.

Again, in *Mattz*, 412 U.S. at 504, n.22, the Court observed:

> Congress has used clear language of express termination when that result is desired. See, for example . . . [t]hat the North Half of the Colville Indian Reservation . . . 'be, and is hereby, vacated and restored to the public domain.'

A fair reading of the relevant Colville Reservation opening act (summarized below) will show that Congress inserted on several occasions the word "vacate" to show



a surrender of reservation boundary and did not rely solely on the phrase public domain:

> That . . . all the following described tract or portion of said Colville Reservation . . . be, and is hereby, *vacated* and restored to the public domain.
>
> That each and every Indian now residing upon the portion of the Colville Indian Reservation hereby *vacated* and restored to the public domain, and who is also entitled to reside thereon, shall be entitled to select from said *vacated* portion eighty acres of land. Such selections shall be made within six months after the date of the President's proclamation opening the lands hereby *vacated* as are not occupied by or in the possession of any other Indian or Indians. [emphasis supplied]

27 Stat. 62-64 (1892).

The argument we make here (that restoring to the public domain is an expression confirming that Indian lands are open to public entry, and is typically inserted by Congress in both statutes that diminish and statutes that do not diminish) is supported in several cases. As the Colville Act, *supra*, shows, "restoring to the public domain" is language inserted after and independent of language which shows that Indians have relinquished their interest in the reservation through a cession agreement or through explicit congressional language of diminishment. The recognition that relinquishment of Indian interests in reservation lands comes first and then placement of the lands in a posture for public entry comes second is also clearly revealed in the setting of the Uintah Valley Reservation. Thus, in discussing the Gilsonite Strip, the Commissioner of Indian Affairs stated in 1895 that the 1888 Act "had been fully executed in accordance with its intent so far as the securing of the consent

of the Indians to the *diminution of their reservation and the restoration of said strip of land to the public domain . . .* " *Ute Indian Tribe v. Utah,* 521, F.Supp. at 1100.

To conclude, Congress's use of the phrase "restore to public domain" is a short-hand way of designating how the former Indian lands would be disposed. But independent language (such as an expression of cession or words inserted by Congress like "vacate") are required to accomplish the first event – namely the relinquishment and full surrender of Indian title and jurisdictional interests in the lands to be opened to entry.

## CONCLUSION

The Court should reverse the Supreme Court of Utah's decision and dismiss, with prejudice, Robert Hagen's conviction, in light of the Utah Supreme Court's denial of Mr. Hagen's constitutional rights by submerging his criminal appeal in that of another defendant, Clint Perank, and in light of the Utah Supreme Court's failure to honor the Court's precedent requiring a clear and unequivocal congressional plan to disestablish.

Respectfully submitted,

MARTIN E. SENECA, JR.
1820 Michael Faraday Drive
Reston, VA 22090
(703) 471-5474

Counsel of Record

DANIEL H. ISRAEL
1715 Pearl Street, Suite C
Boulder, CO 80302
(303) 939-8180

*Counsel for Petitioner*



## APPENDIX

### CONSTITUTION OF THE UNITED STATES

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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AMENDMENT 14

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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18 USC

18 USC § 1151. Indian country defined.

Except as otherwise provided in sections 1154 and 1156 of this title [18 USCS §§ 1154 and 1156], the term "Indian country", as used in this chapter [18 USCS §§ 1151 et seq.], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

---

18 USC § 1152. Laws governing.

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations,



the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

---

18 USC § 1153. Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [18 USCS § 2241 et seq.], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title [18 USCS § 661] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

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No. 92-6281

In the
**SUPREME COURT OF THE UNITED STATES**
October Term, 1992

**ROBERT P. HAGEN,**

Petitioner,

**v.**

**STATE OF UTAH,**

Respondent.

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**ON WRIT OF CERTIORARI TO THE UTAH SUPREME COURT**

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# BRIEF FOR THE RESPONDENT

---

JAN GRAHAM
Attorney General of Utah
CAROL CLAWSON
Solicitor General of Utah
MICHAEL M. QUEALY
**(Counsel of Record)**
Assistant Attorney General
1636 West North Temple
Salt Lake City, Utah 84116
(801) 538-7227

Attorneys for Respondent

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MICHAEL M. QUEALY
**(Counsel of Record)**
Assistant Attorney General
1636 West North Temple
Salt Lake City, Utah 84116
(801) 538-7227

Attorneys for Respondent

## QUESTION PRESENTED

Has the Act of May 27, 1902, 32 Stat. 245, as amended, diminished the Uintah Valley Reservation and restored the unallotted lands to the public domain, so that the town of Myton, Utah--where Petitioner Hagen committed a third-degree felony--is within the State of Utah's criminal jurisdiction?

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## TABLE OF AUTHORITIES

### CASES

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State v. Hagen, 191 Utah Adv. Rep. 26 (Utah 1992) . . . .1

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Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1 (1957) . . . . . .13, 14, 42, 43

United States v. Burroughs, 289 U.S. 159 (1932) . . . . . 26

United States v. Pelican, 232 U.S. 442 (1914) . . . . . .37

Ute Indian Tribe v. State of Utah, 521 F.Supp. 1072 (D. Utah 1981) . . . . . 6

Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986) . . . . . .1



Whiterocks Irr. Co. v. Mooseman, 45 Utah 79, 141 P. 459 (1914) . . . . . .25

**STATUTES AND LEGISLATIVE MATERIALS**

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General Allotment Act of 1887, ch. 119, 24 Stat. 338 . . . . . .17

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H.R. Rep. No. 291, 59th Cong., 1st Sess. (1906) . . . . . .32

H.R. Rep. No. 823 (1906) . . . . . .33

H.R. Rep. No. 5010, 59th Cong., 1st Sess. (1906) . . . . 32

H.R. Rep. No. 943, 62d Cong., 2d Sess. (1912) . . . . . 32

H.R. Rep. No. 2047, 69th Cong., 2d Sess. (1927) . . . . . 32

H.R. Rep. No. 370, 77th Cong., 1st Sess. (1941) . . . . . .32

1934 Indian Reorganization Act, 48 Stat. 984 . . . . . 9

Joint Resolution of June 19, 1902, 32 Stat. 744 . . . . . 2

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Law and Order Code of the Ute Indian Tribe § 1-2-1 . .16

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Order Notice, 10 Fed. Reg. 12,409 (1945) . . . . . .9, 33

Presidential Proclamation of July 14, 1905, 34 Stat. 3119 . . . . . 2, 8, 28, 29

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S. Rep. No. 979, 69th Cong., 1st Sess. (1926) . . . . . 32

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## OTHER AUTHORITIES


1931 Annual Agency Report . . . . . .32

1932 Annual Agency Report . . . . . .32

45 Bureau of Economic & Business Research Report, No. 1 (Univ. of Utah 1985) . . . . . .10

F. Cohen, Handbook of Federal Indian Law, 34-44 (1982 ed.) . . . . . 3

Commissioner of Indian Aff. Rept. (1879) . . . . . .6

David R. Williams, State v. Perank: Is the Uintah-Ouray Reservation "Nailed Down Upon the Border?", 1992 B.Y.U. L. Rev. 1247 . . . . . .41

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## OPINIONS BELOW

The opinion of the Utah Supreme Court in State v. Hagen is reported at 191 Utah Adv. Rep. 26 (Utah 1992) (Joint Appendix ["J.A."]15). The court in Hagen relied on its opinion in the companion case of State v. Perank, 191 Utah Adv. Rep. 5 (Utah 1992) (J.A. 18), and ruled that Myton, Utah, although originally part of the Uintah Valley Reservation, is not presently within the Reservation. The Utah Supreme Court's decisions in Hagen and Perank are in conflict with the decision of the United States Court of Appeals for the Tenth Circuit in Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986) ["Ute Tribe"] (J.A. 88), which held that the original Uintah Valley Reservation exists undiminished, notwithstanding the 1902 Act's restoration of unallotted lands to the public domain.

## JURISDICTION

The judgment of the Utah Supreme Court was entered on July 17, 1992. Petitioner filed a timely Petition for a Writ of Certiorari on October 15, 1992, which was granted on April 19, 1993 (J.A. 186). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

## STATUTES INVOLVED

The relevant statutes and presidential proclamations relating to the Uintah Valley Reservation are set forth below and, except as noted, are reprinted in the Joint Appendix:

Act of May 27, 1902, 32 Stat. 245, 263-64 (J.A. 159).

Joint Resolution of June 19, 1902, 32 Stat. 744 (J.A. 161).

Act of March 3, 1903, 32 Stat. 982, 997-98 (J.A. 163).

Act of April 21, 1904, 33 Stat. 189, 207-08 (J.A. 166).

Act of March 3, 1905, 33 Stat. 1048, 1069-70 (J.A. 166).

Presidential Proclamation of July 14, 1905, 34 Stat. 3119 (J.A. 176).

Presidential Proclamation of September 1, 1906, 34 Stat. 3228 (Appendix A hereto).

## STATEMENT OF THE CASE

### A. STATE v. HAGEN

Petitioner Robert P. Hagen was charged in state district court with distribution of a controlled substance, a third-degree felony under Utah law (J.A. 4). On August 28, 1989, Hagen pleaded guilty to the charge (R. 33). The offense occurred on non-Indian lands near the town of Myton, Utah. Prior to sentencing, Hagen filed a motion to arrest judgment claiming that he was an Indian and, because Myton was within an Indian reservation, the state court lacked jurisdiction (J.A. 8). See 18 U.S.C. § 1151.



The trial court denied the motion and retained jurisdiction (J.A. 9-10). On appeal, the Utah Court of Appeals reversed and, relying on the *en banc* decision of the Tenth Circuit Court of Appeals in Ute Tribe (J.A. 88), held that Petitioner was an Indian, that Myton was within the Uintah Valley Reservation, and that the State of Utah lacked criminal jurisdiction over the Petitioner. State v. Hagen, 802 P.2d 745 (Utah App. 1990).

The Utah Supreme Court granted the State's Petition for a Writ of Certiorari (J.A. 14) and, on July 17, 1992, issued its decision reversing the Utah Court of Appeals. Based on its decision the same day in State v. Perank, the Utah Supreme Court disagreed with the Tenth Circuit Court's decision in Ute Tribe and held that the 1902 Act restored the unallotted lands to the public domain and diminished the Uintah Valley Reservation, that the town of Myton was not part of the Uintah Valley Reservation and was not in "Indian country,"[1] and that the state court had criminal jurisdiction over Hagen (J.A. 15-16).[2]

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[1] The terms "Indian country" and "Indian reservation" are often used interchangeably, and refer to the area--regardless of land ownership--within the boundaries of an Indian reservation. The term "trust lands" refers to lands held in trust by the United States for the exclusive use and occupation of Indians or Indian tribes. See generally F. Cohen, Handbook of Federal Indian Law, 34-44 (1982 ed.). Thus, Indian country or an Indian reservation--with attendant jurisdictional ramifications--can, depending on the situation, include non-Indian land located within the boundaries of a reservation.

[2] The parties in Hagen and Perank have stipulated that, for purposes of determining whether the crimes occurred within Indian country, the record before the federal court in Ute Tribe may be considered. Brief of Respondent State of Utah in Support of Petition for a Writ of Certiorari (App. E 163a-64a). Consequently, all subse-

This Court granted Hagen's timely Petition for a Writ of Certiorari on April 19, 1993 (J.A. 186).

## B. STATE v. PERANK

State v. Perank is the companion case to, and was decided on the same day as, Hagen. The opinion in Perank (J.A. 18) provides the detailed analysis by the Utah Supreme Court about the diminishment of the Uintah Valley Reservation and was cited by that court as controlling authority in Hagen. The Perank case was under advisement at the time the Hagen case reached the Utah Supreme Court.

Perank, like Hagen, pleaded guilty to a felony criminal charge for an offense in the town of Myton, Utah. Like Hagen, Perank later asserted that the state district court lacked jurisdiction over him because he was a Ute Indian and the crime took place within the original boundaries of the Uintah Valley Reservation. Perank relied solely on the *en banc* decision of the Tenth Circuit Court in Ute Tribe (J.A. 88) for the proposition that the original boundaries of the Uintah Valley Reservation were not diminished by the Act of May 27, 1902, 32 Stat. 245, 263-64 ["the 1902 Act"] (J.A. 159). The state district court rejected those claims and imposed Perank's prison sentence. The Utah Supreme Court affirmed (J.A. 74-75).

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quent record citations in this brief will be to that federal court record: JX refers to Joint Exhibits and LD refers to the Joint Compendium of Legislative Documents.



## C. OVERVIEW OF THE AREA IN DISPUTE AND THE STATUTE RESTORING THE LANDS TO THE PUBLIC DOMAIN

### 1. The Disputed Lands Do Not Involve Tribally-Owned Trust Lands

The jurisdictional boundaries of the Uintah Valley Reservation have been the subject of litigation, uncertainty, and conflict for more than fifteen years. While this case presents the question of whether the State of Utah has criminal jurisdiction over Petitioner Hagen, the boundary dispute and its overall jurisdictional ramifications transcend the particular issue affecting Hagen.

The Ute Indian Tribe is a federally-recognized Indian tribe, comprised of the Uintah, White River, and Uncompahgre Bands. There are today approximately 3,000 enrolled members of the Tribe, nearly all of whom live on "trust lands" in the Uinta Basin of northeastern Utah. Ute Tribe, J.A. 130 (Seth, J., dissenting). Trust lands are lands held by the United States for the exclusive use and occupation of Indians or Indian tribes. The dispute in this case does not concern these trust lands, comprising approximately 1.1 million acres in a relatively contiguous block. Rather, the dispute here concerns an area of approximately 400,000 acres that was within the boundaries of the Reservation when created, but was opened for settlement in 1905 pursuant to the 1902 Act, as amended. The disputed area is referred to generally as the "unallotted lands" (lands not allotted to the Indians or reserved for tribal grazing) or as "non-trust lands." Nearly all of the disputed area lies within Duchesne and Uintah Counties.

The town of Myton--where Petitioner Hagen's crime occurred--is situated on non-trust land.[3] It must therefore be determined whether the 1902 Act, as amended and supplemented by the subsequent Indian Appropriations Acts of 1903, 1904 and 1905, diminished the original reservation boundaries or left them intact.

### 2. The Act of May 27, 1902, as Amended, Provides a Comprehensive and Detailed Scheme for Opening the Reservation and Restoring the Surplus Lands to the Public Domain

The original Uintah Valley Reservation, as created by Executive Order and confirmed by Congress in the 1860's,[4] consisted of more than two million acres, most of which are located in Duchesne County.[5] On May 27, 1902, Congress passed an Indian Appropriations Act ["the 1902 Act"] (J.A. 159), which was a complete plan for opening the Uintah Valley Reservation. Allotments of separate tracts of land were to be made to tribal members before October 1, 1903, and all the unallotted lands of the original Uintah Valley Reservation would then be "restored to the public domain" and opened for public settlement, with homesteaders paying $1.25 per acre. Revenues from the sale of the opened lands were to be used for the benefit of the Indians.

On June 19, 1902, shortly after the enactment of the 1902 Act, Congress passed a Joint Resolution establishing a tribal grazing reserve. The Joint Resolution also provided that certain allotments of the Uintah Valley Reservation would be to made the Uncompahgre Indians. J. Res. 31, 57th Cong. 1st Sess., 32 Stat. 744, 745 (1902) (J.A. 161). This Resolution affirms that, after the allotments were made and the grazing reserve established, the surplus lands would be "restored to the public domain."

The actual opening of the Reservation was delayed by three subsequent amendments to the 1902 Act, i.e., the 1903, 1904, and 1905 Indian Appropriations Acts. These amendments extended the period for opening the Reservation to allow the Department of the Interior to complete the required surveying. See, e.g., S. Doc. No. 159, 58th Cong., 3d Sess. 3 (1905) (LD 101). The first amendment to the 1902 Act--the 1903 Indian Appropriations Act (J.A. 163), reaffirmed that the restoration language of the 1902 Act remain unchanged (J.A. 164). The 1903 Act also dispensed with any requirement for consent of the Tribe to the opening; thereafter, consent was limited to the taking of allotments (J.A. 164). The 1904 Act, enacted expressly to carry out the purposes of the 1902 Act, extended the opening date to March 10, 1905, so necessary surveying

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[3] A copy of a map (part of Exhibit I-1B) illustrating the original Uintah Valley Reservation's boundaries and the general land ownership within those areas is attached as Appendix B and was part of the trial record in Ute Indian Tribe v. State of Utah, 521 F.Supp. 1072 (D. Utah 1981).

[4] The Uintah Valley Reservation was not originally created for the Utes. The Act of May 5, 1864, 13 Stat. 63 (LD 4) set apart the Uintah Valley Reservation "for permanent settlement and exclusive occupation of such of the different tribes of Indians of [the Utah] territory as may be induced to inhabit the same."

[5] See Executive Order of Oct. 3, 1861 (I Kappler 900); Act of May 5, 1864, 13 Stat. 63; [1879] Commissioner of Indian Aff. Rept. at 331 (JX 3). The westernmost part of the original Reservation is in Wasatch County, and the easternmost part is in Uintah County.

could be completed. This 1904 amendment left unchanged the 1902 Act language restoring the unallotted lands to the public domain (J.A. 166).

The last amendment to the 1902 Act occurred in the 1905 Indian Appropriations Act (J.A. 166-70). When the Department of the Interior still had not been able to complete the surveys necessary to make the allotments, the Senate, on February 4, 1905, demanded an explanation from the Secretary of the Interior as to why he was not going to meet the March 10 deadline. 39 Cong. Rec. 1863 (1905) (LD 103). The Secretary promptly responded, explaining numerous difficulties, including uncertain funding for surveyors, had prevented timely completion of the allotment program. He made clear the need for an extension of time in which to finalize it. S. Doc. No. 159, 58th Cong., 3d Sess. 2-4 (1905) (LD 101 at 2-4). Accordingly, Congress extended the time for opening the Reservation, to September 1, 1905.

The 1905 Act also specified "the manner" by which the Reservation would be opened. Act of March 3, 1905, 33 Stat. 1048, 1069-70 (J.A. 166). Finally, it granted the President additional authority to set aside reservation lands for other particular federal uses. Except for some specific exceptions not relevant here, the 1905 Act did not change the baseline purpose of the 1902 Act, and the operative provisions of the 1902 Act remained in full force and effect. Thus, President Roosevelt's July 14, 1905 Proclamation opening the Reservation, 34 Stat. 3119 (J.A. 176), refers specifically to the 1902 Act and repeats its restoration language (J.A. 176-77).



### 3. State and Local Officials Have Historically Treated the Unallotted Lands as Within Their Jurisdiction

After 1905--and for the next forty years--the tribal grazing reserve and the allotted lands in the original Uintah Valley Reservation were treated as the Ute Indians' existing reservation.[6] On August 25, 1945, a 217,000-acre tract of opened but undisposed-of land located within what had been part of the original Uintah Valley Reservation was also restored to tribal ownership and "added to and made a part of the existing reservation" by the Secretary of the Interior pursuant to Sections 3 and 7 of the 1934 Indian Reorganization Act, 48 Stat. 984. 10 Fed. Reg. 12,409 (1945) (LD 183); Perank, J.A. 67. Later, the Act of March 11, 1948, 62 Stat. 72, added to the then-existing Reservation an additional 500,000 acres within the former Uncompahgre Reservation (the so-called "Hill Creek Extension").

There is no dispute that the tribal reserves and the remaining allotments, some 360,000 acres, are "Indian country" within the meaning of 18 U.S.C. §§ 1151(a) and (c). Nor does anyone question that the surplus lands restored to tribal ownership and reservation status in 1945 and 1948, which total more than 700,000 acres, are also Indian country.[7] The dispute here involves the approxi-

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[6] See Ute Tribe, J.A. 130-31 (Seth, J., dissenting); S. Doc. No. 78, 66th Cong., 1st Sess. 1 (1919) (letter of the Secretary of the Interior); note 27, infra.

[7] Approximately half of the trust lands lie within the boundaries of the original Uintah Valley Reservation, while the other half lies within the original Uncompahgre Reservation.

mately 400,000 acres of non-trust lands that were restored to the public domain and opened to settlement by the 1902 Act, as amended.[8]

Historically, the disputed area has been the concern of the state and local governments. Roughly 18,000 non-Indians and 300 Indians reside in the disputed area. Since nearly all of the approximately 3,000 enrolled members of the Tribe[9] live on trust lands, the population and land ownership of the disputed area are more than ninety percent non-Indian.[10] Ute Tribe, J.A. 130-31 (Seth, J., dissenting). Within the disputed area (the non-trust lands), there are several incorporated towns and cities (such as Myton, Roosevelt, and Duchesne) and, over the years, there has been significant natural resource, business, and recreational development by non-Indians. Thus, the area in dispute in this case is land over which the State of Utah and its political subdivisions have asserted jurisdiction for seventy years.

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[8] If one includes the U.S. Forest Service lands set apart in 1905, the non-Indian acreage within the original Uintah Valley Reservation's boundaries is approximately 1.7 million acres. See Map, Appendix B hereto (J.A. 185).

[9] Ute Tribe, J.A. 130-31 (Seth, J., dissenting); Bureau of Economic & Business Research Report, Univ. of Utah, Vol. 45, No. 1, at 8, Table 5, July 1, 1984 (1985). In Ute Tribe and Perank, tribal membership is listed as between 1,500 and 1,800. However, a tribal court decision in 1981 allowed several hundred additional individuals to be enrolled. See Chapoose v. Uintah and Ouray Business Committee, Civ. No. 133-77 (1981). See also Perank, J.A. 26.

[10] The seat of tribal government is at Fort Duchesne (not to be confused with the City of Duchesne) on undisputed trust lands.



## SUMMARY OF ARGUMENT

When asked to determine whether a particular surplus lands act diminished an Indian reservation or simply allowed non-Indians the opportunity to settle on lands within existing reservations, this Court has determined congressional intent by looking at the language of the specific act and the act's historical context. Solem v. Bartlett, 465 U.S. 463, 468-70 (1984). Although language is considered most probative, this Court has also considered the subsequent treatment of the lands by federal, state, and local governments. Finally, this Court has looked at the jurisdictional history of the opened lands, or whether the reservation has "lost its Indian character." Id. at 470-72; Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 603-05 (1977).

In this case, the facts relevant to each of these inquiries support the conclusion that Congress intended to diminish the Uintah Valley Reservation--an understanding that history reveals was shared by the Ute Indians and local government officials until recent times. First, the disputed area "lost its Indian character" long ago. Until recently, the state and local governments have asserted jurisdiction over the disputed area without challenge from the Indians, who have minimal, if any, interests in the disputed area. The Ute Tribe has over one million acres on which the majority of the tribal members reside and on which the tribal seat of government is located. In contrast, the residents of the disputed area settled on the opened lands with the understanding that they were outside the Reservation boundaries. This understanding, which has been shared by the Ute Tribe since 1905,

continued undisturbed until litigation in the Ute Tribe case began in 1975.

Second, the language of the 1902 Act is unambiguous --all unallotted lands are "restored to the public domain." The amendments to the 1902 Act do not repeal or in any way alter this language. The United States' assertion that the 1905 Act, which only extended the opening date of the Reservation and provided for the manner of opening, totally superseded the 1902 Act cannot be supported. Indeed, if the 1902 Act were replaced, why would the 1905 Presidential Proclamation opening the Reservation specifically refer to the 1902 Act and incorporate its restoration language? Even more significantly, if the United States' position were accepted, there would have been no congressional authorization for the Indian allotments, for the tribal grazing reserve, or for payment of the proceeds to the Indians. Provisions such as these, which were essential to the opening of the lands for settlement, are found only in the 1902 Act and its amendments.

Third, both executive and legislative actions after 1905 dealing with the Reservation are based on the premise that the restoration language of the 1902 Act diminished the Reservation's boundaries. For example, the Act of January 27, 1906, 34 Stat. 9, extending the time for homesteaders to establish residence on the opened lands, refers to the unallotted lands as land "formerly part" of the Reservation.

Fourth, in prior proceedings concerning the Reservation boundaries, both the Ute Tribe and the United States have conceded that the 1902 Act restored the unallotted



lands to the public domain. For example, in Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1 (1957), the parties stipulated that the Indians received allotments pursuant to the 1902 Act, as amended, and that the surplus lands were "restored to the public domain" under the terms of that Act.

Finally, Petitioner Hagen's collateral estoppel arguments are not properly before this Court, were disavowed by Hagen during the certiorari process, and otherwise lack merit.

For these reasons, the judgment of the Utah Supreme Court should be affirmed.

## ARGUMENT

### I. THE ACT OF 1902, AS AMENDED, RESTORED THE UNALLOTTED LANDS TO THE PUBLIC DOMAIN AND DIMINISHED THE UINTAH VALLEY RESERVATION

#### A. THE LANGUAGE OF THE 1902 ACT AND ITS AMENDMENTS, VIEWED IN THE CONTEXT OF THEIR PASSAGE AND SUBSEQUENT EVENTS, CONFIRMS CONGRESSIONAL INTENT TO DIMINISH THE UINTAH VALLEY RESERVATION

### 1. The Disputed Area Lost its Indian Character Long Ago, and Leaving the Original Uintah Valley Reservation Boundary Intact Will Not Materially Advance the Interests of Tribal Sovereignty, But Will Severely Hamper the Functioning of State and Local Governments

The language of a statute is generally the first and most important element in determining congressional intent. However, in this case it is helpful to begin the analysis by looking at the character of the disputed lands after they were opened for settlement in 1905. As this Court recognized in Solem, when the area involved "has long since lost its Indian character, we have acknowledged that de facto if not de jure diminishment may have occurred." Id. at 471. Thus "who actually moved onto opened reservation lands is . . . relevant to deciding whether a surplus land Act diminished a reservation . . . ." Id. As this Court stated in Rosebud,

> The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts.



Rosebud, 430 U.S. at 604-05 (emphasis added).[11]

The disputed area in this case "lost its Indian character" long ago. Of the roughly 18,000 people living there, approximately 300 are Indians. Nearly all of the other tribal members live on "trust lands." Ute Tribe, J.A. 130-31 (Seth, J., dissenting). Virtually all of the disputed area consists of private, state, and federal property. See Map, Appendix B (J.A. 185). This compares to the current undisputed tribal trust lands of over one million acres, which includes allotments, the grazing reserve, and lands subsequently restored to the Tribe. The seat of tribal government is located on undisputed trust lands at Fort Duchesne and most, if not all, tribal business enterprises are conducted on trust lands.[12]

The 18,000 non-Indians residing in the disputed area are the persons "who actually moved onto the reservation lands" and have been there ever since. It is their "justifiable expectations," built up over a seventy-year period, that would be upset under the position urged by Petitioner

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[11] The United States has taken the position that presidential proclamations opening various reservations are important "because [they were] the basis on which non-Indian settlers purchased land, giving them fair warning that they were purchasing land within an Indian Reservation." Brief for the United States as *Amicus Curiae* at 22, DeCoteau v. District County Court, 420 U.S. 425 (1975) (Nos. 73-1148 & 73-1500). In Respondent's view such presidential proclamations are, therefore, one clear source of such "justifiable expectations."

[12] The demographics in Solem, which held that the reservation was undiminished, were the reverse. Two-thirds of the tribal members lived in the disputed area and the seat of tribal government was located there. Solem, 465 U.S. at 480.

and the United States here and adopted in Ute Tribe. And it is their interests that the Tenth Circuit ignored in spite of this Court's holdings that such factors should be taken into account. See, e.g., Solem, 465 U.S. at 471-72; Rosebud, 430 U.S. at 604-05. If Petitioner prevails, these 18,000 non-Indians and their property arguably would be subject to regulation by the tribal government, a government in which they would have no elective voice. Although the Tribe would not have criminal jurisdiction over non-Indians, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the same cannot be said for civil jurisdiction, particularly with regard to suits in tribal court.[13]

If the original Reservation boundaries are left intact, the practical result would be that the Ute Tribe would preside over an area owned and predominantly populated by non-Indians and in which the Tribe has little presence and no real interest as a sovereign. At the same time, state and local authority would be significantly limited

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[13] See National Farmers Union v. Crow Tribe, 468 U.S. 1315 (1984). Respondent is well aware that recent decisions of this Court have somewhat limited tribal jurisdiction over non-Indians. E.g., Brendale v. Confederated Tribes of the Yakima Nation, 492 U.S. 408 (1989); South Dakota v. Bourland, 508 U.S. ___, 124 L.Ed.2d 606 (1993). However, the exact limits of tribal sovereignty over non-Indians remain undecided. This is particularly true in view of the fact that the Ute Tribe has enacted a comprehensive Law and Order Code (R. Ex. I-20) which, by its own terms, applies to Indians and non-Indians alike within the original Reservation boundaries in a variety of contexts. See Law and Order Code of the Ute Indian Tribe § 1-2-1. Despite the Tribe's assertions to the contrary, Section 3-1-1 et seq. of the Tribal Code comprehensively authorizes exclusion and removal of certain non-Indians. Under these provisions, if Petitioner prevails the Tribe could arguably remove a non-Indian with tuberculosis who was visiting relatives in the town of Myton.



despite the fact that this area has principally been the concern and responsibility of these governments, not the Tribe. In contrast, the result reached by the Utah Supreme Court in Perank would have few, if any, adverse effects on tribal self-government or regulation by the Tribe over its members because the tribal seat of government and most tribal members are on the over one million acres of undisputed trust lands.[14]

Respondent recognizes that the treatment of the disputed area is not, standing alone, dispositive of this Court's inquiry on diminishment. However, these important demographic factors, coupled with the language of the 1902 Act and the context in which it was passed, compels the conclusion reached by the Utah Supreme Court that the Reservation was diminished.

### 2. The Operative Language of the 1902 Act--"Restored to the Public Domain"--Evidences Congressional Intent to Diminish the Uintah Valley Reservation

The historical context of the May 27, 1902 Act, which opened the Uintah Valley Reservation, begins with the General Allotment Act of 1887, ch. 119, 24 Stat. 338. The 1887 Act authorized the President to allot parcels of reservation lands to individual Indians and to open surplus lands to non-Indian settlement. Two primary forces drove the General Allotment Act: first, an increasing demand

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[14] For a more detailed discussion of the demographics of the area, Respondent refers the Court to the Brief of Roosevelt City, Utah, as *Amicus Curiae* in Support of Respondent.

for new lands for settlement in the West and, second, implementation of congressional policy to assimilate the Indians into white society and terminate their dependent status. Solem v. Bartlett, 465 U.S. 463, 466-67 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 590 (1977).

Even though Congress anticipated that the General Allotment Act process would lead to the eventual demise of the reservation system, this Court has not found this policy determinative of Congress's intent with respect to a particular surplus lands act. Solem, 465 U.S. at 468-69, 472; Rosebud, 430 U.S. at 586. Since each act employed its own statutory language and was "the product of a unique set of tribal negotiation and legislative compromise," this Court has examined each surplus land act on a case-by-case basis to ascertain whether Congress intended to diminish a particular reservation. Solem, 465 U.S. at 467.

The unambiguous operative language of the 1902 Act restores the unallotted lands to the public domain. In 1902, the Uintah Valley Reservation contained vast areas of land in excess of the lands necessary to satisfy the allotments and grazing needs of the Indians. As a result, the 1902 Act includes in its operative section a provision restoring to the public domain any lands not allotted to the Indians--language that clearly evidences an intent to diminish:

> That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be



> allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain.

Act of May 27, 1902, 32 Stat. 245, 263-64 (J.A. 159-60) (emphasis added).

Consistent with this operative clause, language evidencing Congress's intent to diminish the Reservation continues in the 1902 Act's secondary provisions. For example, the Act sets a price of $1.25 per acre for the unallotted lands opened for settlement and allocates the proceeds from the "sale of the lands so restored to the public domain" to the Ute Indians (J.A. 159-60) (emphasis added).

A related Joint Resolution, issued by Congress shortly after the 1902 Act's passage, confirms Congress's intent to restore the surplus lands to the public domain after the allotments were made and the grazing reserve established. The Resolution directs the Secretary of the Interior to establish a tribal grazing reserve and provides for certain allotments within the Uintah Valley Reservation to be made to Uncompahgre Utes. J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744, 745 (1902). The final paragraph of the Joint Resolution (J.A. 163) clearly demonstrates Congress's intent to restore the surplus lands to the public domain:

> The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

(J.A. 163).

### 3. The 1903 Act, Which Amended the 1902 Act and Eliminated the Requirement that the Indians Consent to Opening the Reservation, Confirms Congress's Intent to Diminish the Reservation

The 1902 Act was amended three times--in 1903, 1904, and 1905. Each amendment extended the opening date for the Reservation and made other changes to specific provisions of the Act. None of the amendments repealed or in any way affected the operative provision of the 1902 Act restoring the unallotted lands to the public domain. Nor did any of the amendments retreat from Congress's "baseline purpose" to diminish the reservation. See Rosebud, 430 U.S. at 592.

The 1903 Act is pivotal in the Uintah Valley Reservation's opening process because it provided for substantive changes that confirm Congress's continuing intent to diminish the Reservation. First, the 1903 Act stated that



its purpose was to carry out the purposes of the 1902 Act, thus reaffirming Congress's intent to restore the surplus lands to the public domain. Second, it provided that an Indian inspector be sent to obtain the consent of the Utes --not to the opening of the Reservation, but to their individual allotments. Third, the Act provided that, if the Indians' consent to choose their own allotments could not be obtained, the Secretary would assign allotments to them and the Reservation would be opened under the provisions of the 1902 Act, with the opening date postponed to October 1, 1904. Act of March 3, 1903, 32 Stat. 982, 997-98 (J.A. 163).

The consent provision in the 1902 Act relied on so heavily by Hagen and the Ute Tribe was changed significantly and substantively by the 1903 Act. Congress specifically eliminated the consent requirement after this Court held that the United States Government had plenary power to deal with reservation lands and that the Indians' consent to opening a reservation was not required. Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903). Only sixteen years ago, this Court specifically relied on Lone Wolf in holding that the absence of Indian consent did not defeat congressional intent to diminish a reservation. Rosebud, 430 U.S. at 587-88. Thus, because the consent of the Indians to the opening was no longer required, the 1903 Act only provided the Indians the option of choosing their own allotments or having the allotments chosen for them.

In accordance with the directives of the 1903 Act, Indian Inspector James McLaughlin (the same experienced inspector who negotiated the Rosebud agreement) met with the Utes over a period of six days to explain the

effect of the 1903 Act.[15] The following brief extracts from the transcripts of those meetings demonstrate McLaughlin's clear understanding of Congress's intent to extinguish the Reservation boundaries without the Indians' consent after the 1903 Act:

> My friends, Red Cap said my talk was cloudy, and you do not understand it. You are the people who are in the dark in regard to the force of this act of congress, and I am trying to bring you into the light. You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation.
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> . . . .
>
> The question of opening the reservation is not with you; that has been determined by the act of congress . . . . We want to discontinue useless discussion as to the opening of the reservation
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> . . . .
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> . . . .
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> My friends, I have no doubt but that if you were in Washington two years ago the officials of the Department may have told you that your claim to this reservation was good. That was before the decision of the Supreme court of five months ago [Lone Wolf] which I have told you of, since which decision the policy of consulting Indians in regard to opening their reservations has changed. My friends, Congress has passed a law opening your reservation and the president has consented to it by signing the Act. Under that act you may consent to take allotments of your own selections and if you refuse they will be arbitrarily allotted to you, and in addition to your individual allotments 250,000 acres will be set apart for your common grazing grounds. That will be done on or before a year from the first day of next October and your surplus land will be thrown open for settlement on that date.

(JX 162 at 42-45) (emphasis added).

As noted above, the 1904 amendment of the 1902 Act again postponed the opening date of the Reservation, to March 10, 1905. Act of April 21, 1904, 33 Stat. 189, 207-08 (J.A. 166). The 1904 Act was expressly enacted to carry out the purposes of the 1902 Act, and it made no change in the prior statutory language showing congressional intent to restore the unallotted lands to the public domain. Id.

### 4. The 1905 Act Cannot be Read Apart from the 1902 Act It Amends

The 1905 Act was the last Indian Appropriations Act amending the 1902 Act (J.A. 166). It cannot--as Petitioner, the United States, and the Ute Tribe contend--be read apart from the 1902 Act it amends. To do so ignores the clear language of both acts. Further, as a practical matter,

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[15] A more complete compilation of relevant portions of the McLaughlin transcripts is attached hereto as Appendix C. McLaughlin was the designated representative of the United States to negotiate with the Utes.

sole reliance on the 1905 Act would have made the opening as it occurred impossible because that Act did not include key provisions contained in the prior Acts.

On its face, the 1905 Act does not contain any language expressly repealing the 1902 Act or any of the subsequent amendments to that Act. Nor does the 1905 Act indicate a retreat from the "baseline intent" of Congress to restore the surplus lands to the public domain. The 1905 Act does extend the opening date and specify "the manner of opening [unallotted] lands for settlement and entry, and for disposing of the same." Section 1, 33 Stat. at 1069 (J.A. 167) (emphasis added). The 1905 Act provides procedures for accomplishing an orderly settlement of the lands opened by the 1902 Act. For example, it provides that the unallotted lands be disposed of under "the general provisions of the homestead and town-site laws" and opens them to settlement and entry "by proclamation of the President." It also repeals a specific, but minor, part of the 1903 Act dealing with the location of the grazing reserve. These amendments to the 1902 Act, however, were done with "surgical precision." Perank, J.A. 55. The Utah Supreme Court correctly summed up the relationship between the relevant enactments:

> We conclude that the 1902 Act established the basic statutory authority for opening the Uintah Reservation and that Congress intended thereby to diminish the Reservation. The congressional intent to diminish, as well as other essential aspects of the opening of the Reservation that were established by the 1902 Act, remained in full force and effect through the enactment of the 1902 Joint Resolution and the 1903, 1904, and 1905 Acts. The 1902 Act established more than a "baseline purpose" of restoring unallotted, unreserved lands to the public domain. See Rosebud, 430 U.S. at 592. The [1902] Act, on its face, provided for the opening of the Uintah Reservation. In short, the restoration language of the 1902 Act was operative statutory language when the opening finally occurred in 1905.

Id., J.A. 57 (emphasis added).[16] Accord Ute Tribe, J.A. 146-49 (Seth, J., dissenting).

If the 1905 Act is interpreted as totally supplanting the 1902 Act, as decided by the Tenth Circuit *en banc* and as urged by Hagen, the United States, and the Ute Tribe, many essential terms and conditions for the opening of the Reservation would not be addressed. For example, the 1902 Act, not the 1905 Act, provided for allotments to the individual Indians. The 1902 Act, not the 1905 Act, fixed the price to be paid by non-Indian settlers and provided how the proceeds from the sale of the surplus lands were to be used for the Indians' benefit. See Perank, J.A. 56-57.

This point is illustrated in a letter from the Commissioner of the General Land Office to the Commissioner of Indian Affairs, dated September 28, 1922 (JX 403 at 2).

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[16] Shortly after the opening of the Reservation, the Utah Supreme Court "judicially noticed" that the surplus lands had been restored to the public domain pursuant to the 1902 Act. See Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910); Whiterocks Irr. Co. v. Mooseman, 45 Utah 79, 141 P. 459 (1914).

Since the 1905 Act did not specify the price to be paid by settlers, as did the 1902 Act, the Commissioner of Indian Affairs queried whether Congress intended that no price be paid. The question was specifically stated in terms of "whether the [1905 Act] repealed and superseded the [1902 Act]." The Lands Commissioner emphatically answered that "such was not the intention of Congress but that homestead entries . . . should be . . . made subject to the payment required by [the 1902 Act]." The letter specifically referred to a 1905 Interior Department Opinion, which stated, "[I]t was the opinion of this Department that the condition exacting payment of homesteaders found in the Act of 1902 was not repealed by its omission from the Act of 1905, thus preserving the fund created under the Act of 1902 . . . ." 34 I.D. 306, 311 (1905) (emphasis added).

We cannot now, in 1993, read the 1905 Act to include only certain provisions of the 1902 Act--such as those regarding making the allotments, compensating the Indians, and providing for grazing rights--and at the same time selectively exclude from that reading the operative language of the 1902 Act restoring the surplus lands to the public domain. To do so would be to "remake history," which this Court has admonished cannot be done. Rosebud, 430 U.S. at 615.[17]

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[17] This Court has long disfavored implied repeals. Posadas v. National City Bank, 296 U.S. 497, 503 (1936). In fact, the Court has held that "[i]mplied repeals are not favored, and if effect can reasonably be given to both statutes the presumption is that the earlier is intended to remain in force." United States v. Burroughs, 289 U.S. 159, 164 (1932). Effect can reasonably be given to both the 1902 Act and the 1905 Act. The 1902 Act diminished the reservation by restoring the unallotted lands to the public domain and the 1905 Act outlined a method of disposing of those lands restored to the public domain. A subsequent statute does not implicitly repeal an earlier one if the subsequent statute is "merely affirmative, or cumulative, or auxiliary." Posadas, 296 U.S. at 504. The 1905 Act is indeed a cumulative and auxiliary piece of legislation regarding the opening of the Uintah Valley Reservation.



Just as there is no language in the 1905 Act repudiating the operative language of the 1902 Act, there is no indication in the legislative history of the 1905 Act that it replaced the 1902 Act or that Congress intended to retreat from the "baseline purpose" of the 1902 Act to restore the surplus lands to the public domain. In 1905, Congress wanted a speedy conclusion to the Uintah Valley allotment process, but it was equally concerned that a land rush by speculators would deprive bona fide homesteaders of the surplus lands. Congress addressed this concern, voiced in both the House and the Senate, by opening the surplus lands under the homestead and townsite laws so the lands would not fall prey to speculators. 39 Cong. Rec. 1180-82 (Jan. 21, 1905) (LD 103); Hearings, Subcomm., Senate Comm. of Indian Affairs, 58th Cong., 3d Sess. (1905) (LD 100 at 30). Thus, the 1905 Act restricted the methods of entry and settlement of the surplus lands, patterning them after the scheme used in the opening of the Rosebud Reservation. 39 Cong. Rec. 1183 (Jan. 21, 1905) (LD 103).[18]

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[18] This is demonstrated by the following exchange between Representatives Sherman and Stephens in the House debate:

> Mr. SHERMAN. This amendment under consideration proposes to open them under a proclamation by the President, which shall lay down rules and regulations for their opening, the idea being to have such rules and regulations as were prescribed, for instance, in the Rosebud Reservation

## 5. The Presidential Proclamation of July 14, 1905, Opening the Reservation, Confirms that the 1902 Act Was Controlling

In extending the opening date for the Reservation, the 1905 Act authorized the President to open the Reservation prior to September 1, 1905. President Roosevelt opened the Reservation on July 14, 1905. 34 Stat. 3119 (J.A. 176). The Presidential Proclamation expressly recognized the operative effect of the 1902 Act and its "restore to public domain" language. It also expressly acknowledged that the 1903, 1904, and 1905 Acts amended the 1902 Act, leaving the operative language and intent of the 1902 Act intact. The Proclamation provided, in pertinent part:

> Whereas it was provided by the Act of Congress, approved May 27, . . . 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation . . . "shall be restored to the public domain . . . ."

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opening and have been used as the rules and regulations in the opening up of the Indian lands for the last two or three years, and which have proven to be not only beneficial to the Indians, but of advantage to the would-be settlers.

Mr. STEPHENS of Texas. And that is the object of the amendment?

Mr. SHERMAN. Yes, sir.

39 Cong. Rec. 1183 (Jan. 21, 1905) (LD 103).



> And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:
>
> [The Act is here quoted in full.]
>
> Now, therefore, I . . . do hereby declare . . . that all the unallotted lands in said reservation, excepting such as have at that time been reserved . . . will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement, and disposition under the general provisions of the homestead and townsite laws of the United States . . . .

34 Stat. at 3119-20 (J.A. 176-78).

The Court in Rosebud placed strong emphasis on the Presidential Proclamation opening that reservation, noting that the executive branch clearly understood that the acts in question "contemplated a diminution of the Reservation." Rosebud, 430 U.S. at 602. The 1905 Uintah Proclamation is similar to the one involved in Rosebud. It constitutes an "unambiguous, contemporaneous statement, by the Nation's Chief Executive, of a perceived disestablishment" and unmistakably reflects the intent of

Congress. See Rosebud, 430 U.S. at 602-03; accord Perank, J.A. 60.[19]

The 1905 Presidential Proclamation does not stand alone in its understanding that the surplus lands were restored to the public domain.[20] In addition, the subsequent Presidential Proclamation of September 1, 1906, 34 Stat. 3228 (Appendix A hereto) (LD 132) again confirms Congress's intent to restore the unallotted lands to the public domain and diminish the Reservation under the 1902 Act, as amended. See Perank, J.A. 60-61. The purpose of the 1906 Proclamation was to deal with a homestead entry that had mistakenly been filed on a small

[19] Despite the efforts of the United States to downplay the presidential proclamations in this case, it has historically taken the position that such proclamations are very important. See, e.g., Brief for United States as *Amicus Curiae* at 22, DeCoteau v. District County Court, 420 U.S. 425 (1975) (Nos. 73-1148 & 73-1500) ("[T]he most important administrative interpretation of the 1891 Act is the contemporaneous [presidential] proclamation opening the Reservation for settlement.")

[20] The supportive legislative, executive, and historical documents in the record are voluminous. See, e.g., Letter of the Acting Commissioner of Indian Affairs to the Secretary of Interior, May 11, 1905, at 3 (JX 263); H.R. Doc. No. 892, 62d Cong., 2d Sess. 1-2 (1912) (Joint Report of Inspector James McLaughlin and the Chief Supervisor) (LD 146); H.R. Doc. No. 1250, 63d Cong., 3d Sess. 1-2 (1914) (Letter of the Secretary) (LD 149); Solicitor Opinion M-33626, at 2 (August 3, 1944); 59 I.D. 393 (1947); Solicitor Opinion M-36051, at 1-2, 5 (December 7, 1950); Secretarial Order, 36 Fed. Reg. 19920 (1971) (LD 210).

Although a few documents in the vast historical record may indicate non-diminishment, Respondent State of Utah disagrees with the United States that all subsequent legislative and historical documents "contribute nothing of substance to the decision of this case." Brief for United States as *Amicus Curiae* at 27.



portion of the tribal grazing reserve. The 1906 Proclamation adopted basically the same construction of the opening acts as the 1905 Proclamation. Further, and more importantly, it recognized that the Reservation boundaries had been diminished by referring to the "former Uintah Indian Reservation," and by restoring the small homestead tract located on the grazing reserve "to the public domain" so that it would be subject to entry. "Had the surplus reservation lands not been restored to the public domain by the 1902 Act, it would have been pointless to transfer the parcel from the grazing reserve to the public domain." Perank, J.A. 60.

Until recent years, the understanding of other responsible government officials consistently mirrored President Roosevelt's construction.[21] For decades after the opening, Interior officials consistently administered only the trust lands (the tribal grazing reserve, the allotments, and the lands later restored to tribal ownership and Reservation status) as the Tribe's existing Reservation. The response of the Secretary of the Interior in 1919 to a Senate Resolution requesting information concerning the Indians in Duchesne and Uintah Counties is telling. The Secretary stated that the Uintah Indian Reservation "comprises 291,141.65 acres," S. Doc. No. 78, 66th Cong., 1st Sess. 1 (1919), which is, essentially, the area of the tribal grazing reserve.

Another example is a 1941 memorandum from Secretary of the Interior H. Ickes as part of a House Report dealing with the Uintah Irrigation Project. Secretary Ickes stated that "[t]he original area of the

[21] See Perank, J.A. 64; Ute Tribe, J.A. 151-52 (Seth, J., dissenting).

reservation was approximately 2,039,040 acres. Cessions were made . . . at various times so that at present the reservation embraces but 366,000 acres or less than one-fifth of the original." H.R. Rep. No. 370, 77th Cong., 1st Sess. (1941) (LD 179).

These tabulations of acreage may not be completely accurate; however, they show that subsequent Secretaries of the Interior (and everyone else)[22] well understood that the original Reservation had been diminished, and--as late as 1941--consisted of only one-fifth of its original acreage.

Succeeding legislation and other congressional materials are to the same effect.[23] Numerous congressional documents subsequent to the 1905 opening contain references to the "former" Reservation. See, e.g., S. Rep. No. 219, 61st Cong., 2d Sess. (1910) (LD 138) (entitled "Making Available Certain Lands on Former Uintah Indian Reservation").[24]

The Secretarial Order of Restoration in 1945 is also instructive. That Order not only restored 217,000 acres of unsold surplus lands to tribal ownership, but stated that they were "added to and made a part of the existing reservation." Order Notice, 10 Fed. Reg. 12,409 (1945).[25] See also Ute Tribe, J.A. 151 (Seth, J., dissenting). Had the Reservation boundaries survived the 1905 opening, there would have been no point in making those unsold surplus lands "part of the existing reservation," since they were already within the original exterior boundaries.[26]

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[22] See 1929 Annual Report of the Uintah & Ouray Agency, at 1 ("The present Uintah and Ouray Indian Reservation, consisting of approximately 70,000acres of allotted, and 260,000acres of tribal land . . . ." ) (JX 420); 1931 Annual Agency Report, at 4 (JX 425); 1932 Annual Agency Report, at 1 (JX 427); H.R. Rep. No. 370, 77th Cong., 1st Sess. 3 (1941) (Report submitted by Secretary of the Interior). See also S. Doc. No. 78, 66th Cong., 1st Sess. 1 (1919) (Letter of the Secretary of the Interior); H.R. Rep. No. 5010, 59th Cong., 1st Sess. 1-2 (1906) (Letters of Secretary of the Interior and Commissioner of Indian Affairs); H.R. Doc. No. 1279, 60th Cong., 2d Sess. 2-3 (1909) (1908 Letters of Secretary and Commissioner of Indian Affairs); 39 I.D. 79 (1910); 34 I.D. 549, 549-50 (1906).

[23] See, e.g., Perank, J.A. 65 (and Acts cited therein); Act of July 20, 1912, 37 Stat. 196; S. Rep. No. 139, 59th Cong., 1st Sess. 1 (1906); H.R. Rep. No. 291, 59th Cong., 1st Sess. 1 (1906); S. Rep. No. 893, 62d Cong., 2d Sess. 1-2 (1912); H.R. Rep. No. 943, 62d Cong., 2d Sess. 1-2 (1912); S. Rep. No. 979, 69th Cong., 1st Sess. 1-2 (1926); H.R. Rep. No. 2047, 69th Cong., 2d Sess. 2 (1927); 74 Cong. Rec. 3408 (1931).

Characteristic of Congress's treatment is the Act of July 20, 1912, which extended the time for filing proof of entry by "any person who has heretofore made a homestead entry for land which was formerly a part of the Uintah Indian Reservation in the State of Utah, authorized by the Act approved May twenty-seventh, nineteen hundred and two, and Acts amendatory thereto . . . ." 37 Stat. 196 (LD 145) (emphasis added). See also Rosebud, 430 U.S. at 603 n.25.

[24] For other references to the "former" Reservation, see H.R. Rep. No. 823, Feb. 9, 1906 (LD 122); S. Rep. No. 2561--Indian Appropriations Bill at 131, April 13, 1906 (LD 124); Public Law 258, H.R. 15331, at 375-76 (June 21, 1906) (LD 127); Senate Bill 6375 (P.L. 345), June 29, 1906 (LD 129); Public Law 144--Indian Appropriations Act, at 185, April 4, 1910 (LD 139).

[25] The complete text of the Order is set forth in Perank, J.A. 66.

[26] This is buttressed by a June 14, 1941 letter from the Lands Commissioner to the Secretary of the Interior (submitting a draft restoration order), which states that all of the undisposed lands to be restored to tribal ownership are "within the former boundaries of the Uintah and Ouray Indian Reservation . . . " (JX 450 at 1).

In sum, the 1902 Act, as amended, established a clear baseline intent to diminish the Reservation. The surrounding circumstances and subsequent legislative and administrative treatment of the area confirm that the Reservation was diminished and today includes one million acres of trust lands.[27]

## B. PETITIONER, THE UNITED STATES, AND THE TENTH CIRCUIT TAKE AN UNDULY NARROW VIEW OF THIS COURT'S HOLDING IN SOLEM AND INCORRECTLY APPLY IT TO THE FACTS AND CIRCUMSTANCES OF THIS CASE

Hagen, the Ute Tribe, and the United States generally accuse the State of Utah and the Utah Supreme Court of overstating the importance of "restore to the public domain" language. See, e.g., Brief for the United States as *Amicus Curiae* in Support of Certiorari at 10-11. In doing so, the opposing parties recite a strained and unrealistically narrow interpretation of the Solem test and ignore the line of diminishment cases on which Solem relies. The *en banc* panel of the Tenth Circuit similarly misread the holding of Solem in this regard. This mistake comes from not recognizing that in all cases, including Solem, the question of diminishment involves a unique

[27] Even the Ute Tribe has treated only the trust lands as comprising its post-1905 Reservation. See, e.g., 1957 Ute Ten Year Development Program, at 66-68 (JX 465); 1969 Annual Report of the Uintah Indian Tribe, at 1 (JX 473). See also Ute Tribe, J.A. 153 (Seth, J., dissenting); Perank, J.A. 69.



statute and surrounding circumstances as indicators of congressional intent.

### 1. The Tenth Circuit's Decision in Ute Tribe is Inconsistent With This Court's Prior Diminishment Cases and is the Only Case that Fails to Give Effect to Clear Restoration Language

As the Utah Supreme Court noted in Perank, J.A. 37, Ute Tribe is the only case standing contrary to the long line of cases recognizing "restore to the public domain" language as a clear marker of congressional intent to disestablish. The Ute Tribe majority read Solem as altering this long-standing principle of interpretation. A fair reading of Solem, however, shows this Court did not reject the firmly-established rule of interpretation concerning restoration language, but merely applied it to specific factual circumstances and statutory language and concluded that diminishment had not occurred in that case.

Unlike the language of the 1902 Act at issue here, the operative provision of the statute in Solem did not provide for the restoration of the surplus lands to the public domain. Instead, an isolated reference to "public domain" appeared in an inconsequential section providing that tribal members could harvest timber on certain portions of the opened lands "only as long as the land remained part of the public domain." Section 9, 35 Stat. 464. Although the Court acknowledged that this oblique reference was some evidence of diminishment, it nonetheless found that, because the phrase was "isolated" in a non-operative sec-

tion of the statute, it could not, by itself, be dispositive. Solem, 465 U.S. at 474-75; accord Perank, J.A. 36-37.

The Tenth Circuit failed to consider the unique facts and language at issue in Solem and instead found that restoration language "is not the same as a congressional state of mind to disestablish," and thus is not "unequivocal evidence of Congress'[s] intent to change boundaries." Ute Tribe, J.A. 99, 106. In so holding, the majority acknowledged that this had not been the law prior to Solem and, indeed, all of the judges who had considered the case before Solem agreed that such language was synonymous with disestablishment.[28]

The Tenth Circuit's reading of Solem is not correct. Solem did not establish new standards, and it reaffirmed--rather than altered--the principles announced in Seymour v. Superintendent, 368 U.S. 351 (1962), Mattz v. Arnett, 412 U.S. 481 (1973), DeCoteau, and Rosebud. For example, although in Rosebud and DeCoteau the Court was divided on the question of whether the particular area involved had retained reservation status, it was unanimous that "restore to the public domain" language amounted to an unequivocal expression of an intent to disestablish. See Rosebud, 430 U.S. at 589; id. at 618 (Marshall, J., dissenting); DeCoteau, 420 U.S. at 426-27, 446; id. at 463

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[28] In her concurring opinion in Ute Tribe (in which a majority of the judges joined), Judge Seymour stated, "Although the district court and the panel viewed ["restore to the public domain"] as language of cession, I believe Solem dictates a different result." J.A. 106. The Tenth Circuit also erred in holding that the 1905 Act superseded the 1902 Act.



(Douglas, J., dissenting); accord Seymour, 368 U.S. at 354-55; Perank, J.A. 34-36.[29]

In this case, there is no dispute that the so-called "Gilsonite Strip"--a 7,000-acre tract located on the edge of the original Uintah Valley Reservation--was disestablished by the Act of May 24, 1888, 25 Stat. 157. As Judge Seymour stated, "Congress was completely clear when it terminated Uintah rights in the Gilsonite Strip . . . ." Ute Tribe, J.A. 114. Yet the operative provisions concerning the Gilsonite Strip used the same language as the 1902 (Uintah) and 1894 (Uncompahgre) Surplus Land Acts, and expressly restored the area "to the public domain." Act of May 24, 1888, § 1, 25 Stat. 157 (LD 18). The Tenth Circuit offered no reason why the restoration language contained in those Acts should be interpreted differently, and there is none.[30]

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[29] The analysis in these more recent decisions, though more developed, is consistent with the earlier decision of this Court in United States v. Pelican, 232 U.S. 442 (1914). In Pelican, this Court first dealt specifically with "restored to the public domain" language in legislation opening a portion of the Colville Reservation. Pelican was decided at a time contemporaneous with many of the reservation openings. Congress had provided that the north half of the Colville Reservation was to be "vacated and restored to the public domain," to be disposed of under applicable public land laws. Prior to the opening, Indians were given individual allotments. This Court held that the restoration of the lands to the public domain diminished the north half of the Reservation, except for any Indian allotments, which remained "Indian country." Pelican, 232 U.S. at 445-46. See also Seymour, 368 U.S. at 354-55.

[30] The dissent in Ute Tribe, on the other hand, relied upon the understanding of the parties regarding the effect of the 1888 Act in interpreting the 1902 (Uintah) Surplus Land Act, as amended. Ute Tribe, J.A. 139 (Seth, J., dissenting). See also Perank, J.A. 43.

The Tenth Circuit, relying on a footnote in Solem, also held that there was "considerable doubt as to what Congress meant" in using public domain terminology in the Solem legislation since the affected lands "could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." Solem, 465 U.S. at 475 n.17. It is evident, however, that the Court did not intend this statement in Solem to overrule its prior decisions and to discount the significance of public domain language as a general proposition. The Court had already indicated that such language supported the diminishment claim. In any event, the Court would hardly have confined its comments to one sentence in a footnote had it intended such a drastic departure from the views, expressed by both the majority and dissenting Justices in the prior cases, regarding the significance of such restoration language. In short, Solem does not, as the Tenth Circuit believed, signal this Court's abandonment of its previous interpretations of "restoration to public domain" language. Such language continues to be a clear expression of diminishment, and the Tenth Circuit erred in holding otherwise.

Since its ruling in Ute Tribe, the Tenth Circuit has revisited the issue of the legal significance of "restore to the public domain" language, and has cast doubt on this aspect of its analysis in Ute Tribe. In its recent decision in Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 581 (1990), the Tenth Circuit held that a portion of the Navajo Reservation in New Mexico had been diminished when the operative section of the Executive Order opening the tract restored the disputed area to the public domain. In reaching that conclusion, the Yazzie panel was



openly critical of the treatment of the "public domain" language in Ute Tribe:

> Our conclusion in Ute that the generic phrase ["restore to the public domain"] was ambiguous is undercut . . . by our conflicting statement earlier in the same opinion that public domain language implies "a wholesale diminishment of the Reservation." Moreover, our conclusion [in Ute Tribe] is unexamined and unsupported in the opinion.

Yazzie, 909 F.2d at 1400 (emphasis added). The Yazzie court concluded:

> In summary, federal court cases reveal that neither Congress, the courts, nor Indian tribes themselves have insisted that restoration language be accompanied by more explicit cancellation language. Rather, they have used or accepted simple, operative restoration language as language of reservation termination in many situations. We have found no case where operative restoration language was not accepted as language of termination.

Id. at 1404 (emphasis added).[31] See also Perank, J.A. 37-41.

The *en banc* decision in Ute Tribe is inconsistent with the decisions of this Court and is further undercut by the Yazzie decision. At the turn of the century, reservation

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[31] A rehearing *en banc* in Yazzie was denied by an evenly-divided vote in the Tenth Circuit.

status and public domain status were uniformly understood to be mutually exclusive. In construing restoration language as it has in Ute Tribe, the Tenth Circuit has attempted to "remake history," which cannot be done in order to resurrect a reservation diminished long ago. Rosebud, 430 U.S. at 615; DeCoteau, 420 U.S. at 449.

### 2. The United States' Contention that Unambiguous Language of Cession and Unconditional Compensation to the Indians is Required to Find Diminishment is Incorrect and Ignores Contemporaneous Legislation and Congressional Policy

Relying almost exclusively on Solem, the United States urges a test for diminishment that would require express language of cession, coupled with an unconditional commitment to compensate the Indians. Brief for the United States as *Amicus Curiae* at 9-12. This Court, however, has never stated that cession language is the only indicia of congressional intent to disestablish. See, e.g., Rosebud, 430 U.S. at 588 n.4.[32] Moreover, cession language necessarily implies consent of the Indians, which the Court in Lone Wolf held was not necessary to diminish a reservation. See Rosebud, 430 U.S. at 589-90, 597-98.

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[32] The document from the National Indian Law Library referred to in Justice Marshall's dissent in Rosebud, 480 U.S. at 618 n.3, states, "Those statutes which we have titled 'restored to the public domain' are those which appear to have the clearest language of disestablishment." National Indian Law Library, Doc. No. 002279 at 2 (1973).



Further compounding its error, the United States argues that, in addition to language of cession, Congress must evidence an unconditional commitment to compensate the Indians. To the contrary, all Solem says is that language evidencing congressional intent to diminish a reservation, coupled with a commitment to compensate, creates an "almost insurmountable presumption" in favor of diminishment. Solem, 465 U.S. at 470-71; see also DeCoteau, 420 U.S. at 447-48. Nowhere does Solem, or any other decision of this Court, mandate that language of diminishment must be coupled with compensation.[33] The United States erroneously seeks to transform a presumption into a benchmark test.[34]

In addition to requiring language of cession, the United States recites an artificially narrow view of the weight to be given the contemporaneous legislative history and the circumstances surrounding the passage of a

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[33] In fact, Rosebud says otherwise. There, a proposed amendment to an 1889 treaty provided for a fixed-sum payment and was approved by three-fourths of the adult tribal males. 430 U.S. at 587. Congress, however, never ratified that amendment, opting in 1903 for a "new policy . . . that the lands shall be . . . paid for by the settlers, and the money to be paid to the Indians only as it is received . . . from the settlers." Id. at 592 (footnote omitted). Though the Indians never consented to this payment scheme, the Court said, "In examining congressional intent, there is no indication that Congress intended to change anything other than the form of, and responsibility for, payment." Id. at 594-95. The method of payment approved in Rosebud was virtually identical to the payment scheme required by Congress for the Uintah Valley Reservation (J.A. 162).

[34] See David R. Williams, State v. Perank: Is the Uintah-Ouray Reservation "Nailed Down Upon the Border?", 1992 B.Y.U. L. Rev. 1247, 1258-59.

surplus lands act. The United States argues that when language of both cession and compensation are not evident from the face of the act, the legislative history and surrounding circumstances must unequivocally reveal a widely-held understanding that the reservation would shrink.

Contrary to this approach, Solem instructs us that when an act contains clear language indicating an intent to diminish, the legislative history and surrounding circumstances should still be examined, but only to buttress or confirm the language on the face of the act. Only when express language of termination is absent must the legislative history and surrounding circumstances "unequivocally" reveal a congressional understanding that a reservation would be diminished. See Solem, 465 U.S. at 471; Rosebud, 430 U.S. at 586-87. Here we have unambiguous language, coupled with supporting circumstances, revealing Congress's understanding that the Uintah Valley Reservation was diminished.

### 3. The United States' Position in this Case is Inconsistent with its Position in Earlier Cases Concerning Diminishment and is Contrary to the Position it Has Previously Taken with Respect to this Reservation

The United States' argument that the 1905 Act displaced the congressional intent to restore the surplus lands to the public domain is inconsistent with the position it has taken in prior litigation involving the same Acts pertaining to the Uintah Valley Reservation. In Uintah and White River Bands of Ute Indians v. United States,



139 Ct.Cl. 1 (1957), the United States entered into a stipulation adopted by the Court of Claims that quoted the 1902 Act and then succinctly stated, "Pursuant to this [1902] Act and amendments thereto . . . allotments in severalty . . . were made to the Uintah and White River Indians, and surplus lands . . . . were restored to the public domain, and opened for disposition under the public land laws for the benefit of the Indians." 139 Ct.Cl. at 22 (emphasis added); see id. at 5-6. In that case, the United States (and the Utes) consistently and repeatedly maintained that the original Uintah Valley Reservation was a former reservation. Throughout its opinion and findings, the Court of Claims also treated the original Uintah Valley Reservation as having ended. E.g., id. at 2, 25, 28, 56, 64, 69, 70.[35]

The position now taken by the United States is also inconsistent with its position in prior diminishment cases before this Court. Prior to Solem, the United States consistently took the position that "restore to the public domain" language constituted a clear expression of congressional intent to diminish. In its memorandum as *amicus curiae* in Rosebud, the United States said, "[I]n DeCoteau the United States itself purchased the land . . . pursuant to an agreement with the Indians; this . . . restored the land to the public domain and extinguished the reservation." Mem. for United States in Support of

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[35] When the Ute Indian plaintiffs appeared in the Court of Claims, they asserted in their opening statement, "Now, the Act of May 27, 1902, comes as a matter of particular importance in this suit because that is the Act as amended under which the Uintah Reservation was ultimately broken up." Tr. Jan 11, 1954 at 195, Uintah and White River Band of Utes v. United States, No. 47569 (emphasis added).

Petitioner at 13, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). In its brief on the merits in the same case, the United States explained that "the clear language of other Acts expressly restoring lands to the public domain is notably absent." Brief for the United States as *Amicus Curiae* at 8, Rosebud.

In its brief on the merits in DeCoteau, the United States argued, "The absence of language in the 1891 Act expressly altering the boundaries of the reservation or returning land to the public domain shows that the reservation boundaries were not altered." Brief for the United States as *Amicus Curiae* at 16, DeCoteau v. District County Court, 420 U.S. 425 (1975) (Nos. 73-1148 & 73-1500). It also contended that "use of the word 'cede' and the [sum-certain] payment arrangement of the act did not change the Reservation boundaries," id. at 17, in direct contradiction to its position here. In its brief on the merits in Mattz, the United States said, "This Court's more recent decision in Seymour v. Superintendent . . . is, in our view, controlling here. . . . In holding that the Act did not terminate the reservation . . . the Court emphasized the absence from the Act of language abolishing the reservation or 'restoring that land to the public domain'. . . ." Brief for the United States as *Amicus Curiae* at 24, Mattz v. Arnett, 412 U.S. 481 (1973) (No. 73-1182). Even in its brief opposing the petition for a writ of certiorari in Ute Tribe, the United States said, "This is not to say that 'public domain' language is irrelevant; in some instances, it is highly probative." Brief for the United States as *Amicus Curiae* at 11, Ute Indian Tribe v. State of Utah (No. 85-1821). Finally, as noted in Perank, J.A. 68 n.25, the United States formally acknowledged before the Utah Supreme Court that the surplus lands had been restored



to the public domain pursuant to the 1902 Act and the amendments thereto.

## II. PETITIONER'S COLLATERAL ESTOPPEL ARGUMENTS ARE NOT PROPERLY BEFORE THIS COURT, WERE PREVIOUSLY DISAVOWED BY HIM BEFORE THIS COURT, AND OTHERWISE LACK MERIT

Petitioner Hagen contends that the State of Utah is precluded from defending his attack on state court jurisdiction because of collateral estoppel. That issue was not raised in Hagen's Petition for a Writ of Certiorari, and is not properly before this Court. Further, Hagen's arguments lack merit.

Rule 14.1(a), Rules of the Supreme Court, provides that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." This rule protects the theory underlying the certiorari process and prevents the practice of "smuggling" additional issues into a case after certiorari is granted. See, e.g., Irvine v. California, 347 U.S. 128, 129 (1954). Hagen's Petition for a Writ of Certiorari clearly set forth the "question presented" as whether the Reservation had been diminished by the 1902 Act so as to give the state court criminal jurisdiction over him. Nowhere in the question presented, or anywhere in the petition, is the issue of collateral estoppel raised or discussed.

Furthermore, during the petitioning process, Hagen himself recognized the parameters set by Rule 14.1(a). When the Ute Tribe, as *amicus curiae*, opposed the granting of Hagen's Petition for a Writ of Certiorari on

collateral estoppel grounds, Hagen strongly resisted the injection of a collateral estoppel issue into the case before this Court. He responded (through former counsel) as follows:

> [T]he Ute Indian Tribe couched the question presented in terms of whether the State of Utah should be prevented from relitigating the issue of whether the . . . Reservation had been disestablished. Rule 14.1.(a) . . . states that "only the question set forth in the petition or fairly included therein will be considered by the court." The question presented in the petition was whether the reservation had been diminished by acts of congress. The rule does not appear to allow different issues to be raised. . . . Regardless of the opinion held by the Ute Indian Tribe of the Perank decision, the decision has been made and is controlling in petitioner's case.

Supplemental Brief of Petitioner at 1-2. Regardless of the fact that Hagen has retained new counsel, he should not be allowed to raise a new issue not properly presented in his original Petition for a Writ of Certiorari, one which he has specifically disavowed.

Hagen also claims that, in rendering its decision on his case, the Utah Supreme Court failed to address his collateral estoppel claims. Petitioner's Brief at 25. This argument is fanciful. The primary opinion of the Utah Supreme Court in the two companion cases was rendered in State v. Perank (J.A. 18). Collateral estoppel, although not raised by Perank, was carefully addressed by the Utah Supreme Court in footnote 3 of that decision, Perank, J.A.



20-21 n.3, and that ruling applies equally to Hagen. The Utah Supreme Court noted that, even if that defense had been raised by Perank, "its application against the State of Utah would be problematic." Perank, JA 21 n.3. The Court concluded:

> [T]he issue of reservation diminishment can arise in a number of civil contexts in which the State of Utah is not a party, and rather than delay a decision on an issue of such substantial public importance that will inevitably recur, we think it appropriate to address the diminishment question, even if res judicata were otherwise applicable against the State.

Id. As applied to Perank, this discussion by the Utah Supreme Court is probably dictum. However, as applied to Hagen this language is a direct and clear ruling. The Utah Supreme Court determined it would not apply the doctrine of collateral estoppel to bar litigation of the Reservation diminishment issue for reasons of public policy. Thus, Hagen's assertion that the Utah Supreme Court failed to even consider his collateral estoppel argument is without merit.[36]

---

[36] As a practical matter, even if the Hagen decision were properly reversed on collateral estoppel grounds, the Utah Supreme Court's decision in Perank would still stand, and along with it the conflict between that court and the Tenth Circuit--a conflict that can only be settled by this Court.

## CONCLUSION

The judgment of the Utah Supreme Court should be affirmed.

Respectfully submitted,

JAN GRAHAM
Attorney General of Utah
CAROL CLAWSON
Solicitor General of Utah
MICHAEL M. QUEALY
**(Counsel of Record)**
Assistant Attorney General
Attorneys for Respondent
State of Utah

# APPENDIX

## APPENDIX A

**Presidential Proclamation of September 1, 1906, 34 Stat. 3228, LD 132:**

WHEREAS, the Secretary of the Interior, on July 11, 1905, under the authority of the act of June 19, 1902 (32 Stats., 744) amended by the act of March 3, 1903 (32 Stats., 982, 998), and March 3, 1905 (33 Stats., 1048, 1069, reserved certain lands in the former Uintah Indian Reservation in Utah, including Lots 2 and 13 in Sec. 10, T. 2 S., R. 1 E., containing 8.80 acres, for the Uintah Indian Grazing Reserve; and whereas, the President of the United States in his proclamation of July 14, 1905, opening the lands in the said Uintah Reservation to settlement and entry, excepted from such opening the lands included in said grazing reserve; and whereas one David Eskelson was, on September 26, 1905, erroneously allowed to include in his homestead entry No. 806, the said Lots 2 and 13, on which lots he has placed valuable improvements, and which, by virtue of their small area and being entirely segregated from the balance of the grazing reserve by the claims of the Raven Mining Company, are of no value as a part of said reserve:

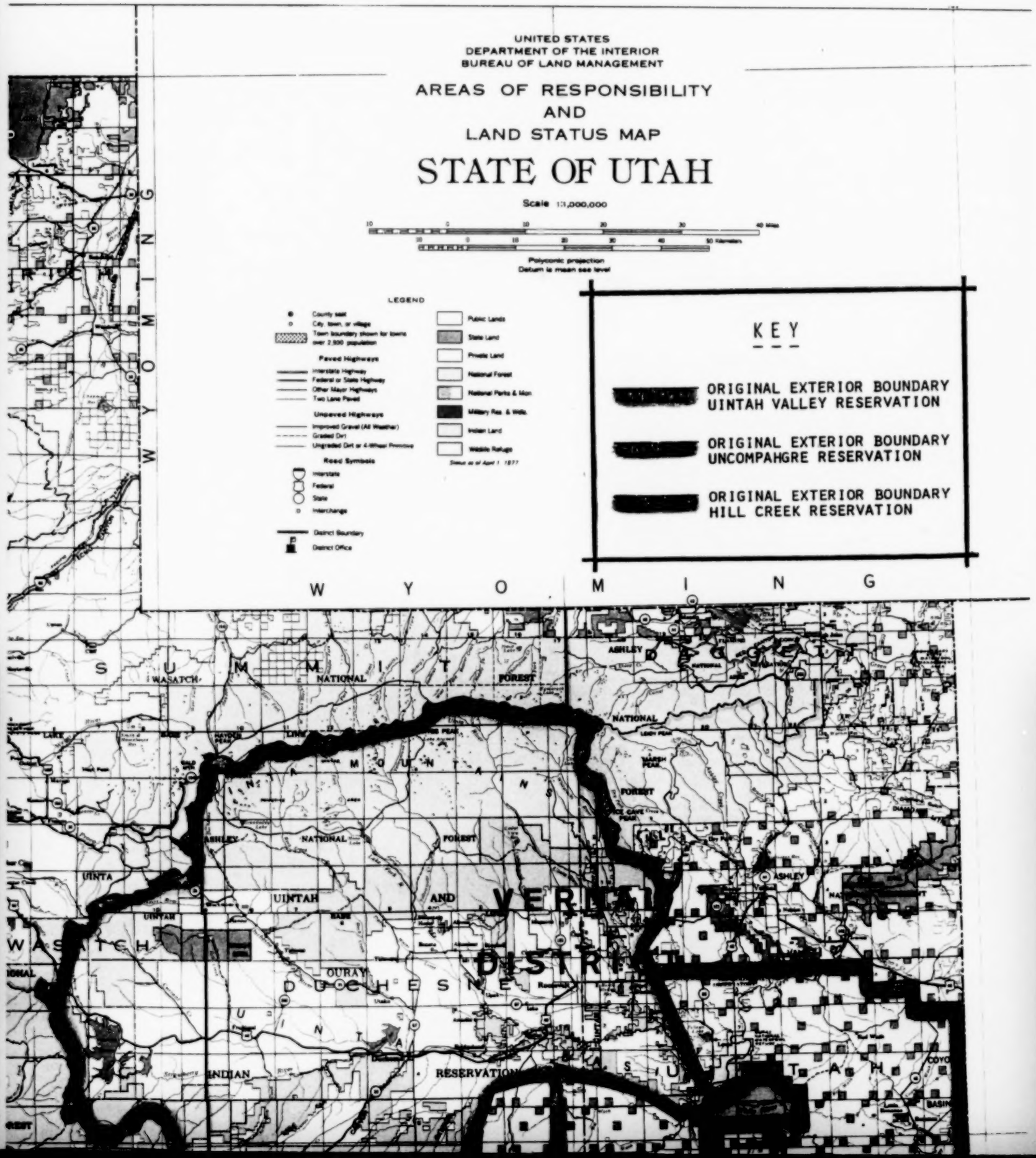
Now, therefore, I, THEODORE ROOSEVELT, President of the United States, by virtue of the power in my vested, do hereby declare and make known that the lots numbered 2 and 13 of Section 10, Township 2 S., of Range 1 E., Uintah Special Meridian, in Utah, are hereby restored to the public domain.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, the 1st day of September in the year of our Lord, one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirty-first.

THEODORE ROOSEVELT

By the President:
ALVEY A. ADEE
Acting Secretary of State.


UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
AREAS OF RESPONSIBILITY
AND
LAND STATUS MAP
STATE OF UTAH
Scale 1:1,000,000
Polyconic projection
Datum is mean sea level
LEGEND
County seat
City, town, or village
Town boundary shown for towns over 2,500 population
Paved Highways
Interstate Highway
Federal or State Highway
Other Major Highways
Two Lane Paved
Unpaved Highways
Improved Gravel (All Weather)
Graded Dirt
Ungraded Dirt or 4-Wheel Primitive
Road Symbols
Interstate
Federal
State
Interchange
District Boundary
District Office
Public Lands
State Land
Private Land
National Forest
National Parks & Mon.
Military Res. & Wdls.
Indian Land
Wildlife Refuge
Status as of April 1, 1977
KEY
ORIGINAL EXTERIOR BOUNDARY
UINTAH VALLEY RESERVATION
ORIGINAL EXTERIOR BOUNDARY
UNCOMPAHGRE RESERVATION
ORIGINAL EXTERIOR BOUNDARY
HILL CREEK RESERVATION
W Y O M I N G
S U M M I T
WASATCH
NATIONAL
FOREST
ASHLEY
NATIONAL
FOREST
UINTA
UINTAH
AND
VERNAL
DISTRICT
WASATCH
OURAY
DUCHESNE
UINTA
INDIAN
RESERVATION
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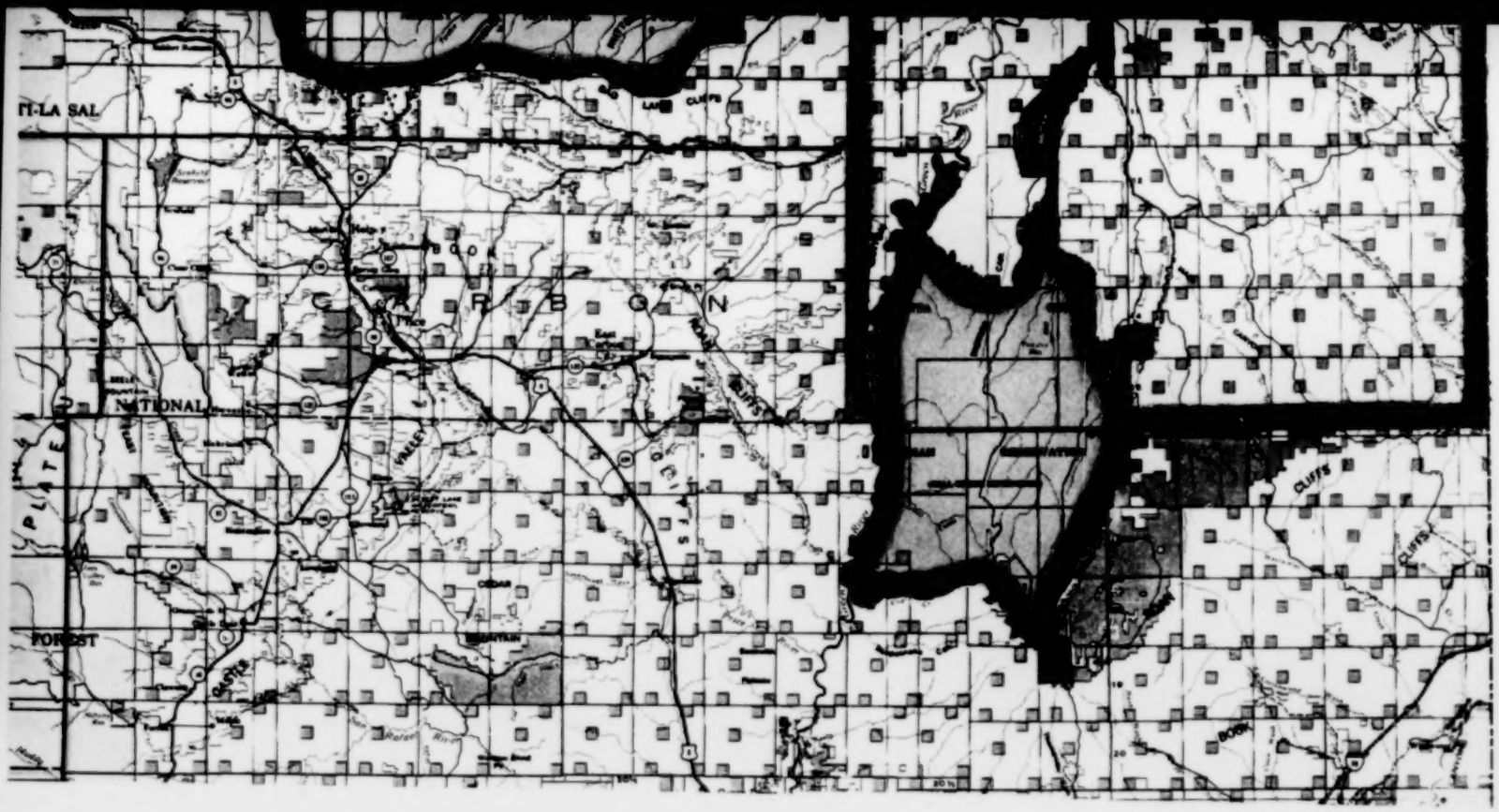


R A D O

## APPENDIX C

**Exerpts from Minutes of Councils Held by James McLaughlin, S. Indian Inspector, with the Utah and White River Ute Indians at Uintah Agency, Utah, From May 18 to May 23, 1903 (JX 162):**

[Inspector McLaughlin]:

Until quite recently, the policy of our Government has been that Indians had unquestioned right to all lands of their respective reservations, but a recent decision of the Supreme Court of the United States is that Indians have no right to any part of their reservations except what they may require for allotments in in [sic] severalty or can make proper use of.

This was the decision of the Supreme Court on January 5th last in the case of a Kiowa Indian of Oklahoma named Lone Wolf, which involved the question of the Indian's title to lands. The court decided that the Government had the right to legislate in regard to the surplus lands of Indians without consulting the Indians concerned. But if they take allotments, they cannot be disturbed, their title to the lands allotted to them being secured to them by law. By that decision of the Supreme Court, Congress has the legal right to legislate in regard to Indian lands, and Congress has enacted a law which requires you to take your allotments. The Secretary of the Interior and the Commissioner of Indian Affairs are very anxious that you consent to the provisions of this Act so that you may get the best of your reservation lands for yourselves. JX 162, pp. 3-4.

* * * *

As I told you yesterday, the decision of the Supreme Court is the highest authority in this land, and the Supreme Court has decided that the sovereign right of ownership of land is in the Government and the Indian is entitled to only what land he can make use of. JX 162, p. 10.

* * * *

A number of your speakers have said that you do not want your land stolen from you. My friends, these hills, these streams, these valleys will all remain just as they are. There will be no change in the nature of the country but the improvements that will come when white people come in among you. My friends, Red Cap said my talk was cloudy, and you do not understand it. You are the people who are in the dark in regard to the force of this act of congress, and I am trying to bring you into the light. You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation. Each of you will have a boundary to your individual holdings and there will also be a border to that 250,000 acre tract set apart for pasturage. You fear that you are going to be confined to the tract of land allotted. That is not so, and I will explain a little more clearly. For many years you have occupied this large tract of land known as your reservation, and when you went outside that tract the white men you met thought you had no right to travel outside of the reservation, but when you take your allotments you can travel like white men and you will not need a pass. Your Agency will be continued just the same as now; the Agent will have full jurisdiction just the same as now, to protect your interests, and as citizens you will have the protection of the laws of the state to redress injuries against you. The opening of the reservation and taking of allotments give you a great many privileges you do not enjoy at the present time. Remember your allotments are exempted from taxation for twenty five years. You will receive what is called a trust patent for your respective allotments which secures the land to the allottees and their children, and none of you can sell your individual allotments during the trust period of twenty five years. Now my friends, I think we are coming nearer each other and that you understand me. The question of opening the reservation is not with you; that has been determined by the act of congress. One of your speakers said that Washington never sent out that word before. That may be true, but I am now here to announce it to you, and my friends, I wish you to understand fully and clearly the import of the words which I convey to you. We want to discontinue useless discussion as to the opening of the reservation and take up the question whether or not you are willing to take your allotments as provided in the act.



Tim Johnson:

You do not talk like they talked to me in Washington, you talk as though you stole Washington's mouth. Here are men who were with me in Washington. The Secretary talks just the way you have been talking but the president don't talk that way. He did not talk that way when I was there. I don't believe that you come from the president. You are not from Washington; you are from

where congress is. They should not have sent you here. They should have sent some one here to ask the Indians about this first. We did not talk about this allotment when I was there. They told me "when those fellows talk don't pay attention to them. If they talk about your land like that don't let it get into your ears." While we were talking there the secretary telephoned, and Washington said "Pay no attention to him. I do not want him to come into my house. Let him stay out there." That's the reason we are holding back on this. The secretary told us about this $1.25 business. That has been talked before.

Inspector McLaughlin:

With reference to the statement Tim Johnson has made, no act of congress becomes a law until signed by the President and I am here today talking to you people and presenting to you the will of the President, because he has signed the Act and made it a law, that is, the Act of Congress for opening your reservation was approved and signed by the President and it therefore is sanctioned by him. The Act having been approved by him it now becomes the duty of the Secretary of the Interior to carry out that law, as he represents the President in Indian matters. My friends, I have no doubt but that if you were in Washington two years ago the officials of the Department may have told you that your claim to this reservation was good. That was before the decision of the Supreme Court of five months ago which I have told you of, since which decision the policy of consulting Indians in regard to opening their reservations has changed. My friends, Congress has passed a law opening your reservation and the president has consented to it by signing the Act. Under that act you may consent to take allotments of your



own selections and if you refuse they will be arbitrarily allotted to you, and in addition to your individual allotments 250,000 acres will be set apart for your common grazing grounds. That will be done on or before a year from the first day of next October and your surplus land will be thrown open for settlement on that date. Therefore, my friends, it is for you to decide whether you prefer selecting your allotments for yourselves or that they be arbitrarily assigned to you. It is useless for you to talk along the lines you have been talking. You should now confine your deliberations to the consideration of the one proposition, that is, the acceptance of your allotments. Therefore, for the remainder of this day, tonight, and tomorrow morning, confine yourselves to the consideration of this question whether you are willing to accept your allotments or have them arbitrarily allotted to you. You have been wasting time trying to discuss a matter entirely foreign to the question before you. Remember the question before you is, will you consent to accept your allotments or not? Think of this question and try to give me an answer to it to-morrow afternoon at two o'clock. We will now adjourn till two o'clock tomorrow afternoon. (JX 162, pp. 42-45).

Supreme Court, U.S.
FILED
SEP 18 1993
OFFICE OF THE CLERK

No. 92-6281

In The

# Supreme Court of the United States

October Term, 1993

ROBERT P. HAGEN,

*Petitioner,*

vs.

STATE OF UTAH,

*Respondent.*

On Writ Of Certiorari
To The Supreme Court Of Utah

## REPLY BRIEF OF PETITIONER

MARTIN SENECA
Counsel of Record
1820 Michael Faraday Drive
Reston, VA 22090
(703) 471-5474

DANIEL H. ISRAEL
1715 Pearl Street, Suite C
Boulder, CO 80302
(303) 939-8180

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## I.

## ROBERT HAGEN'S COLLATERAL ESTOPPEL, DUE PROCESS AND RIGHT TO COUNSEL CLAIMS SHOULD BE RULED UPON.

Utah has elected not to dispute the soundness of those claims, relying instead on the proposition that those questions are not properly before the Court. Brief of Respondent, p. 45. Below we set forth the reasons why we believe they are.

### A. The State of Utah is Playing "Fast and Loose" With the Federal Courts and Should be Judicially Estopped.

In *Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072 (D. Utah 1981) (hereinafter, "*Ute Tribe District Ct.*") *aff'd* 773 F.2d 1087 (10th Cir. 1985) (*en banc*) (hereinafter, "*Ute Tribe en banc*"), *cert. denied*, 479 U.S. 994 (1986), the Utah federal courts determined that the Uintah Valley Reservation had not been disestablished by Congress when opening the Reservation to nonIndian entry in 1902-1905. On appeal in *Ute Tribe en banc* the State of Utah vigorously defended that federal district court decision:

> [T]he ultimate determination of the [district] court [ ] that . . . the Uintah Reservation was not disestablished . . . was carefully reached after a deliberate and painstaking evaluation of thousands of pages of documents, after weighing the testimony of witnesses, after examining maps and photographs, and then by placing this giant mosaic of law and fact into historical and practical perspective. In so doing, the [district] court was sensitive and obedient to all relevant guidance of the decisions of the U.S. Supreme Court. . . .

Opening Brief of State of Utah, on appeal to the Tenth Circuit in *Ute Indian Tribe v. Utah*, pp. 2-3.

Utah further stated:

> While Utah did not receive all that it requested in the lower court, it does feel that it had a fair trial, and that it is virtually impossible for any party to

> present a persuasive argument to show that the district court committed reversible error. *Id.*

Before the Court today, Utah seeks a ruling that, in fact, the boundaries of the Uintah Valley Reservation were disestablished – a ruling contrary to the Utah federal court ruling which it supported twelve years ago. Utah's conflicting positions gives rise to judicial estoppel, a bar employed when a litigant is "playing fast and loose with the courts" and when "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3rd Cir. 1953). Indeed, the Court acknowledged this doctrine nearly 100 years ago:

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

*Davis v. Wakelee*, 156 U.S. 680, 689 (1895); *see also Steagald v. United States*, 451 U.S. 204, 209 (1981); *In re Cassidy*, 892 F.2d 637 (7th Cir. 1990); *Teledyne Industries, Inc. v. NLRB*, 911 F.2d 1214 (6th Cir. 1990); *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83 (1st Cir. 1990); and *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3rd Cir. 1988).

Having voluntarily intervened in the federal court proceedings 17 years ago, *Ute Tribe District Ct.*, 521 F.Supp. at 1075, n. 1, and having embraced the decision of its federal courts preserving the boundary of the Uintah Valley Reservation, the State of Utah is playing fast and loose with this Court. It should be estopped from doing so.

### B. Because Collateral Estoppel Was Pressed and Passed Below, it Should Be Ruled Upon.

Collateral estoppel was both pressed and passed upon below. *United States v. Williams*, ___ U.S. ___, 112 S.Ct. 1735, 1738 (1992). Indeed, it was pressed by the State of



Utah, which asked its State Supreme Court to reverse a decision of the Utah Court of Appeals, because the State Court of Appeals had held the State of Utah collaterally estopped by the findings in *Ute Tribe District Ct.* and *Ute Tribe en banc. State v. Hagen*, 802 P.2d 745 (Utah App. 1990) *rev'd* 191 Utah Adv.Rep. 26 (J.A. 15) (hereinafter, "*Hagen*").[1] Moreover, the decision of the Utah Supreme Court in *Utah v. Perank* (J.A. 18) (hereinafter, "*Perank*"), which applied its decision to Robert Hagen, in fact, adverted to collateral estoppel, even though collateral estoppel had not been raised in the *Perank* appeal, only in the *Hagen* appeal. *Perank* (J.A. p. 21, n. 3)

The Court has emphasized that it is essential that a matter before it be both "pressed and passed" by the courts below so as to permit the Court to "have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido, California*, ___ U.S. ___, 112 S.Ct. 1522, 1534 (1992). Because collateral estoppel has been fully briefed and was considered by the courts below, the Court should rule on its applicability.

### C. Utah's Stipulation Makes *Ute Indian Tribe en banc* and *Hagen* One and the same Case.

The State of Utah, by stipulation (*see* Brief of Respondent in Support of Petition for Writ of Certiorari at 164a), incorporated and made a part of the record "the designated record in *Ute Indian Tribe v. State of Utah, et al.*, 773 P.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986) . . . together with all appellate briefs." That stipulation, voluntarily entered into by the State of Utah, permits the Court to address collateral estoppel. The Courts of Appeals for the fifth, second and eighth circuits have, *sua sponte*,

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[1] The specific question asked of the Utah Supreme Court by the State of Utah was: "should [certiorari] be granted to review the court of appeals' decision that this Court cannot decide *Perank* in a manner contrary to *Ute Indian Tribe* and that Myton is therefore within the reservation?"

reached the res judicata issue under comparable circumstances:

> We are cognizant that *res judicata*, as such, has not been specially pled. . . . [H]owever, where all the relevant facts are contained in the record before us and all are uncontroverted, we may not ignore their legal effect, nor may we decline to consider the application of controlling rules of law to dispositive facts, simply because neither party has seen fit to invite our attention to the issue by technically correct and exact pleadings. We do so *sua sponte*.

*American Furniture Co. v. International Accommodations Supply*, 721 F.2d 478, 482 (5th Cir. 1981)[2].

Indeed, this Court has acknowledged this prerogative, at least where the same court has considered the issue presented. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting). This power should be exercised to protect the federal rights of criminal defendant Robert Hagen.

### D. Collateral Estoppel is Embraced Within the Question Presented.

Sup. Ct. R. 14.1(a) provides that only the questions set forth in the petition or fairly included therein will be considered by the Court. The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. *Yee*, 112 S.Ct. at 1532. Mr. Hagen's defense of collateral estoppel arising out of the *Ute Tribe en banc* decision, is fairly included in the question presented to the Court, for the following reasons:

First, the question presented, "whether the Uintah and Ouray Indian Reservation was diminished by the act of May 27, 1902, 32 Stat. 245, so as to confer criminal jurisdiction over Indians within the unallotted area of the Reservation

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[2] See also *Hedger Transp. Corp. v. Bushey & Sons, Inc.*, 186 F.2d 236 (2nd Cir. 1951) and *Wilson v. United States*, 166 F.2d 527 (8th Cir. 1948). The Courts of Appeal have considered res judicata sua sponte because of the important public interest underlying res judicata.



upon the State of Utah," focuses on the power of the State of Utah to criminally prosecute Indians. That is, because the question presented emerges from a criminal prosecution and not a declaratory judgment action, the power of the Utah courts over Robert Hagen is the question before the Court and that power is defined either by application of collateral estoppel or by the court's disestablishment precedent. The inquiry into the 1902-1905 opening of the Uintah Valley Reservation is necessary only if the State of Utah is not bound by *Ute Tribe en banc*. That the parties considered collateral estoppel to be fairly included is confirmed by the parties entering into a stipulation, discussed above, which expressly and formally incorporated into the instant record before the Court, the entire record in *Ute Tribe en banc*.

Second, Petitioner in his Petition of Certiorari to the Court set forth the unequivocal basis of collateral estoppel, described below, and the State of Utah, in its response, never contested this description.

> The issue decided by the Supreme Court of the State of Utah, whether the Uintah and Ouray Reservation has been diminished, is identical with the issue decided by the Tenth Circuit (*en banc*) in *Ute Tribe*. Both the Ute Indian Tribe and the State of Utah had a full and fair opportunity to litigate the issue which was adjudicated on the merits by the Tenth Circuit.

Petition for Writ of Certiorari of Petitioner, p. 7.

In his Supplemental Brief, Petitioner, Hagen, through his Utah counsel observed, without case citation, that the question of collateral estoppel as it may bind the State of Utah appears to raise a separate question from the diminishment question presented. Supplemental Brief of Petitioner, pp. 1-2.[3] At the same time, however, Petitioner told the Court that

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[3] The State of Utah claims that this reply by Mr. Hagen, made in response to the efforts of the Ute Indian Tribe, filing a Brief Amicus Curiae, to reassert the primacy of the federal courts in Utah through the initiation of an anti-injunction proceeding in *Ute Tribe District Ct.*, (Brief of *Amicus Curiae* Ute Indian Tribe in Opposition to Granting the Writ of Certiorari), constitutes a waiver of the question

both he and *Perank* were riding piggyback on *Ute Tribe en banc*: "Furthermore, the Supreme Court of the State of Utah had the benefit of the entire record considered by the Tenth Circuit, including copies of all Briefs submitted by the parties which are filed with the Tenth Circuit." Supp. Brief of Petitioner, p. 3.

Whether or not a question, like the applicability of collateral estoppel, is fairly included within a question presented, turns primarily on (1) the extent to which the subsidiary issue was considered below and (2) the extent to which the subsidiary issue is closely connected. *See*, e.g., *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905 (1991) (The impact of tribal sovereign immunity on Oklahoma's collection of past state taxes – the question presented – embraces Oklahoma's efforts to have the Tribe prospectively collect such taxes.); *Braniff Airways, Inc. v. Nebraska State Board of Equalization*, 347 U.S. 590 (1954) (Whether the taxpayer's airplanes acquired taxable status under the Commerce Clause – the question presented – embraced taxpayers' efforts to resist taxable status under the Due Process Clause); and *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) (Whether a partial assumption of state jurisdiction over an Indian Reservation is authorized under Public Law 280 and, if so, does it violate the Equal Protection Clause – the question presented – permitted the Tribe also to challenge the partial

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presented of the impact of collateral estoppel. But as Hagen explained, having already been sentenced to the Utah State Penitentiary, he could not rely on the laudable efforts of the Ute Tribe to successfully cut off his prison sentence through reinstating the federal court proceeding. Hagen had no choice but to also pursue at the same time, relief in this Court. Moreover, to the extent that Hagen failed to expressly pursue collateral estoppel relief, it does not prevent the Court from concluding that collateral estoppel is subsidiary to the question presented. In a different criminal setting the Utah Supreme Court noted, "[u]nder such circumstances, failure to consider defendant's assigned error merely because he was tardy or inartful in raising the issue previously strikes us as manifestly unjust. We believe at the very least, such action would deny defendant due process, as guaranteed under our federal and state constitutions." *State v. Haston*, 846 P.2d 1276, 1277 (Utah 1993).



assumption on the basis that Washington State had not repealed its state constitutional disclaimer). Like *Potawatomi*, *Braniff*, and *Confederated Bands*, collateral estoppel here is "implicit" in the question presented – the scope of Utah's criminal court jurisdiction over Indians. It should therefore, be considered by the Court.

### E. The Court Should Reach the Collateral Estoppel, Due Process, and Effective Assistance of Counsel Issues as Plain Error.

Under exceptional circumstances, especially in criminal cases, the Court can reach errors to which no exception has been made. *United States v. Frady*, 456 U.S. 152, 163, n. 13 (1982). The Court will do so where the errors are obvious or if they "otherwise seriously effect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Errors must be both obvious and substantial. *United States v. Brown*, 555 F.2d 407, 420 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). Moreover, plain error may be applied less rigidly when reviewing a potential constitutional error. *United States v. Torres*, 901 F.2d 205, 228 (2nd Cir. 1990); *United States v. Jefferson*, 925 F.2d 1242, 1254 (10th Cir. 1991). Mr. Hagen has not only urged the Court to reinstate the proper role of the federal courts in Utah through a ruling on collateral estoppel, but also, Mr. Hagen has set forth significant claims that the coupling of his appeal and that of Mr. Perank by the Utah Supreme Court violated both his Fourteenth Amendment due process rights and his Sixth Amendment rights to assistance of counsel. See Brief of Petitioner, pp. 25-29.[4]

As explained below, the Court should utilize plain error to reach Hagen's collateral estoppel and Constitutional claims. First, the Court has acknowledged that the consolidation or severing of criminal defendants may be undertaken in

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[4] The Court has acknowledged its right, *ab initio*, to review federal constitutional claims arising for the first time out of the conduct of the state court of last resort. *Grannis v. Ordean*, 234 U.S. 385, 392 (1914).

order to "promote economy and efficiency" but only so long as those objectives can be achieved "without substantial prejudice to the right of the defendants to a fair trial". *Zafiro v. United States,* ___ U.S. ___, 113 S.Ct. 933, 938 (1993). Moreover, the Court has intervened to ensure that states do not invoke state procedures which deprive defendants of federal constitutional rights. *Rogers v. Richmond,* 365 U.S. 534, 547-548 (1961). *See also Boles v. Stevenson,* 379 U.S. 43, 45-46 (1964). In *Evitts v. Lucey,* 469 U.S. 387, 401 (1985) the Court stated: "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *See also Gomillion v. Lightfoot,* 364 U.S. 339, 347 (1960).

To conclude, the submerging of Hagen's appeal (and the concomitant disappearance of his collateral estoppel defense) in *Perank* is an example of state judicial procedures gone awry. Indeed, Utah Supreme Court Justice Zimmerman, in dissent, so acknowledged.[5] Accordingly, the Court should find plain error and reach Hagen's collateral estoppel, due process, and right to effective assistance of counsel defenses.

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[5] "I find almost incredible the refusal of the majority of this court to accord comity to a federal court's decision in an area in which the federal government has preeminent authority and a unique trust responsibility. A majority of this court has given the State of Utah what it has desperately sought for six years – a second shot at persuading the United States Supreme Court to reject the Tenth Circuit's ruling and to give Utah control over a large part of the original reservation." (J.A. p. 76). Also, Justice Zimmerman raised concerns about the fundamental fairness and due process of the state court proceedings: "I would object to the State's opportunistic misuse of *Perank's* petty criminal prosecution to readjudicate a settled issue under any circumstance, but the unequal and inadequate briefing of the boundary issue in this case makes it a particularly poor vehicle for bringing us into a direct confrontation with the Tenth Circuit. *Perank's* brief contained a total of six pages of argument, the bulk of it concerning his assertion that he is an Indian. He allotted fewer than two pages to jurisdictional and boundary issues. In contrast, the State filed a fifty-page brief, devoting the majority of it to an attack of the Tenth Circuit's decision in *Ute Indian Tribe* and to a reargument of the boundary issue." (J.A. at 77) (emphasis supplied).



### F. *Stoll v. Gottlieb* Directs the Court to Rule Upon Collateral Estoppel.

Yet a final reason why it is essential that the Court examine the issue of collateral estoppel arises from the following rule of full faith and credit which this Court has fashioned from the Full Faith and Credit Clause, the Supremacy Clause, Article III, and the Congressional Full Faith and Credit Act, 28 U.S.C. § 1738:

> [T]he judgments and decrees of the Federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances. But where the judgment or decree of the Federal Court determines a right under a federal statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court of its rendition.'

*Stoll v. Gottlieb,* 305 U.S. 165, 170 (1938) (*quoting Deposit Bank of Frankfort v. Board of Councilmen,* 191 U.S. 499, 520 (1903).

As explained in our *Opening Brief,* pp. 12-24, the Utah Supreme Court in fact failed to honor the full faith and credit mandate set out, *supra,* in *Stoll.*[6] That is, the Utah Supreme Court, in this appeal, intentionally and deliberately ignored the supremacy of federal-court-decreed federal law and substituted Utah-created federal law. This, Utah cannot lawfully do. We therefore, request the Court to set Utah straight.

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[6] In other circumstances, Utah has honored the doctrine. *Copper State Thrift and Loan v. Bruno,* 735 P.2d 387 (Utah App. 1987). Moreover, the Court has recently reaffirmed *Stoll: Maine v. Taylor,* 477 U.S. 131, 137 (1986) and *University of Tennessee v. Elliott,* 478 U.S. 788, 794 (1986). *See also Delaware Valley Citizens Council v. Commonwealth of Pennsylvania,* 755 F.2d 38 (3rd Cir. 1985) ("What was attempted in the state courts and the ostensible relief granted by the state's highest court, of course, flies in the face of settled law and the doctrine of res judicata." *Id.* at 42)

## II.

## THE COURT'S TEST FOR RESERVATION DISESTABLISHMENT – HONORED IN UTE TRIBE *EN BANC* IS ABUSED BY THE UTAH SUPREME COURT.

Utah and its Amici request the Court to rewrite the law of Reservation disestablishment because, as we show below, they are unable to overcome the Court's promise to the Indians. "[d]iminishment . . . will not be lightly inferred. Our analysis of surplus land Acts requires that Congress clearly evince an 'intent to change . . . boundaries' before diminishment will be found." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977)).

### A. Utah Wants the Statutory Test Thrown Out.

In order for Utah to prevail, it must convince the Court to reverse *Solem* and to conclude (contrary to *Solem*) that the placing of Reservation lands in the public domain satisfies as a matter of law the required test of statutory disestablishment: "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem*, 465 U.S. at 470. In *Solem*, the Court acknowledged that while the phrase "in the public domain" exhibits some evidence of diminishment, it is not conclusive, largely because it is inherently ambiguous as to whether placing lands in the public domain refers to the public title to the lands or to their location outside of an Indian Reservation. *Solem*, 465 U.S. at 475.[7]

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[7] Utah cites to no decisions of this Court in support of its proposition that restoration of unallotted lands to the "public domain" effects a disestablishment of those lands from the affected Reservation. *See* Resp. Br. at 17-23. At the same time, *Amici* League of Cities, *et al.*, p. 20, n. 12 obviously briefing issues of first impression to them, string cite to a number of lower federal court decisions which, *Amici* erroneously assert, "followed this Court's lead in concluding that language ordering the return or restoration of land to the public domain has the effect of diminishing a reservation." Brief of *Amici*, League of Cities, *et al.*, p. 20, n. 12. In fact, in only one of the cases cited by these *Amici* did the relevant statute include the term "public domain". *See United States ex rel. Condon v. Erickson*, 478 F.2d 684, 687 (8th Cir. 1973), *aff'd sub nom, Solem v. Bartlett*, 465 U.S. 463 (1984) (authorizing the affected Indians to use timber on unallotted lands "only so long as the lands remain part of the public domain"). The Eighth Circuit concluded, as did this Court when asked to review the same statute nine years later, that such language was not sufficient to evince a Congressional intent to diminish the Cheyenne River Reservation. *See Condon*, 478 F.2d at 685-86; *Solem*, 465 U.S. at 475.



In contrast to the inherent ambiguity embodied in "public domain", the Court has identified congressional actions which evidence a present and total surrender of all Indian Reservation interests. In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Act of March 3, 1891, 26 Stat. 1035 ratified an 1889 cession agreement where the Indians agreed to "cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation. . . . " *DeCoteau*, 420 U.S. at 437 (quoting *Commissioner's Report* to Sec. of Interior, S. Exec. Doc. No. 66). Moreover, the ratifying act created a sum certain of $2,203,000 to pay the Indians for the ceded land. *DeCoteau*, 420 U.S. at 441. Then, in *Rosebud*, 430 U.S. at 591, n. 8, the Court concluded that the Act of May 30, 1910, 36 Stat. 448, effected a disestablishment, for it, like the 1891 act in *DeCoteau*, ratified a cession agreement where the Indians agreed to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota."

A review of the 1902-1905 Acts at issue here shows that unlike *Rosebud* and *DeCoteau*, the opening of Ute lands was made with no reference to an agreed cession of Reservation boundaries. Nor do the 1902-1905 Ute Acts describe the Reservation as "vacated," "discontinued" or "abolished" – language which Congress has used elsewhere to terminate a Reservation. *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22 (1973). While the 1902 Act provided that the unallotted lands "within said Reservation" shall be restored to the public domain (the

only language to which Utah can point to show extinguishment of Reservation boundaries), one month later in the joint resolution of June 19, 1902, 32 Stat. 744, Congress described the opening of the unallotted lands as "lands . . . open to disposition under any public land law . . . " (J.A. p. 162). Then, in the Act of March 3, 1903, 32 Stat. at 997, Congress referred to the opening of the unallotted lands "to public entry on said Uintah Reservation". (J.A. p. 164). Finally, in both the Act of April 21, 1904, 33 Stat. at 207 and the actual opening Act of March 3, 1905, 33 Stat. at 1069, Congress described the opening of the unallotted lands to "public entry, "and in 33 Stat. at 1069, provided entry" . . . under the general provisions of the homestead and townsite laws . . . " (J.A. pp. 166-167). Under the Court's precedent, these words of Reservation-opening do not evidence a present and total surrender of all Indian interests.[8]

### B. Utah wants the "Surrounding Events" Test Rewritten.

In the absence of explicit statutory language showing a present and total surrender of all tribal interests, the Court has looked to surrounding events – "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress," *Solem*, 465 U.S. at 471, to see whether such events "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the

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[8] *Compare Solem*, 465 U.S. 463 (statute authorized the Secretary to "sell and dispose" of the unallotted lands opened, but did not disestablish the affected lands); *Mattz*, 412 U.S. 481 (a declaration that unallotted lands were "subject to settlement, entry and purchase" under the homestead laws opened, but did not disestablish, the affected lands); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962) (a declaration that unallotted lands "shall be open to settlement and entry under the homestead laws" opened, but did not disestablish, the affected lands) with *Rosebud*, 430 U.S. 584 (1977) (a statute based on agreement whereby Indians consented to "cede, surrender, grant and convey to the United States all their claim, right, title and interest" in a defined portion of the Reservation disestablished those lands); *DeCoteau*, 420 U.S. 425 (a ratification of agreement whereby Indians consented to "cede, sell, relinquish and convey" unallotted lands disestablished those lands).



proposed legislation . . . " *Id.* in *Rosebud*, the court relied in part upon the findings of Inspector McLaughlin who explained to the Sioux Indians there that its cession agreement "will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." *Rosebud*, 430 U.S. at 591-592.

That same Inspector McLaughlin represented the United States in the opening of the Uintah Valley Reservation during 1902-1905. Because there was no cession agreement entered into between the United States and the Ute Tribe as there was in *Rosebud*, McLaughlin's task was limited to explaining to individual Indians the inevitability of Congress' plan to open the Reservation.[9] Never once during the days of meeting with the Ute Indians did McLaughlin tell the Indians that the shape or size or location of their Reservation would be changed. To the contrary, the talk was limited to opening their present Reservation to nonIndians. Indeed, Officer McLaughlin used the word "opening" 24 times and the Ute Indians, in response, used the word "opening" 14 times. *See* minutes of meetings with Ute Indians, Brief, Duchesne County, pp. 333a-407a. That the retention by the Utes of their land holdings was the subject of negotiations, as opposed to the dismantling of the Reservation, is demonstrated by the following statement of Inspector McLaughlin:

> My friends, if the entire Reservation was of any benefit to you, and you could make proper use of it all, you would not be disturbed in its possession. But there is more land here than you need. Congress has provided for the opening of the surplus land in the way I have explained.

*Id.* at 390a.

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[9] That is, because the United Stated did not seek or obtain a formal cession agreement with the Ute Indian Tribe as a sovereign entity, but rather only sought (and did not obtain) the consent of individual Indians to Congress' opening plan, there exists here no United States "transaction . . . negotiated with the Tribes", but rather less formal evidence of whether the parties saw the events as opening Reservation lands or, in contrast, eliminating a significant and identifiable block of the Reservation.

McLaughlin emphasized that the opening would not take away what they have but only improve the way of life for the Indians:

> My friends, I want to tell you people that your Agency will remain just as it is. You will have an Agent provided who will look after your interests just as at the present time, and any change that is going to take place will be for the better, as you will have individual allotments.

*Id.* at 380a.

In response to the fear of the Indians that the White man would come to steal the Indians' allotments, McLaughlin assured them that each of them would have a boundary to his individual holdings, even though with the opening there would be no outside boundary to the Reservation. *Id.* at p. 368a. Utah and its Amici seize upon this one reference to an outside boundary as establishing a "widely held contemporaneous understanding that the effected Reservation would shrink." But neither Utah nor its Amici read on to see that the reference to individual boundaries replacing the outside boundary was not, as in *Rosebud,* to describe the new shape, size, and location of the Reservation. Rather, the Utes were assured that while nonIndians would be free to settle on the open lands, the Indians' control of the Reservation would not be diminished. Only a few sentences later McLaughlin said:

> You fear that you are going to be confined to the tract of land allotted. That is not so. . . . Your Agency will be continued just the same as now; the Agent will have *full jurisdiction just the same as now.* . . . *Id.* (emphasis supplied)

Therefore, in contrast to *Rosebud* and *DeCoteau* there is no clear evidence here of a reduced Reservation size, shape, or location.

### C. Utah Corrupts the Court's Use of Baseline Intent.

Perhaps the most radical request of Utah and of its Amici is to convert the "baseline intent" necessary to effect a termination of boundaries from an intent focused solely on the



Reservation opening at issue to *any* cession appearing in *any* land transaction in the long history of a given Reservation. In *Rosebud,* the Court found that a 1901 cession agreement, quoted above, constituted an unambiguous extinguishment of all Indian interests and that a series of statutes ending with the Act of May 30, 1910 implemented that 1901 agreement. Not having in their pocket a cession agreement in Utah nor indeed consent by a majority of the Ute Indians[10], Utah and its Amici fabricate a new "theory" of baseline intent. They claim to find the required disestablishment intent in the Act of May 24, 1888, 25 Stat. 157, which opened a small sliver of land for mineral entry, the so-called Gilsonite Strip.

They take the Indians' understanding with respect to that isolated 1888 event and spread it to hundreds of thousands of acres opened in 1905 to nonIndian homesteaders, farmers and townsites. Their corruption of baseline intent will not work. First, the Gilsonite Strip involved a small portion of mineral lands only; second, it was consented to by a three-fourths vote of the Tribal membership in 1888, *Ute Tribe District Ct.,* 521 F.Supp. at 1099; third, with Tribal consent, Congress did not specify that the lands be opened, but rather that a portion of the Reservation itself, within the "following boundary," be "declared to be public lands of the United States and restored to the public domain". 25 Stat. at 157. Finally, as in the case of *Rosebud* and *DeCoteau,* Congress paid a sum certain for the Gilsonite Strip. Joint Resolution of June 19, 1902, 32 Stat. 744.

The condition precedent of a baseline intent to disestablish relating directly to the disputed homestead opening found in *Rosebud* simply does not exist here. In *Rosebud,* 430 U.S. at 605-606, all parties agreed that the cession agreement effected a complete extinguishment, and that the substance and intent of the ratifying 1904, 1907, and 1910 statutes all dealt with the same opening. Here, no party has ever suggested (until Utah and its Amici) that the 1888 plan of the

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[10] The State of Utah concedes that at the opening of the Unitah Valley Reservation, Ute Indian consent "was wholly lacking." *Ute Tribe District Ct.,* 521 F.Supp. at 1118.

United States and the Ute Indians, with respect to the Gilsonite Strip, was carried forward lock, stock and barrel, 14 years later to the opening of thousands of Uintah Valley acres for homestead and townsite purposes.[11] The Court should reject Utah's historically unsupported theories.

## III.

## NEITHER PRESENT DEMOGRAPHICS NOR CONTEMPORARY FEDERAL POLICIES FAVOR DISESTABLISHMENT

This appeal will determine whether the State of Utah criminal justice system (as opposed to federal and tribal courts) will prosecute Indians committing crimes on the 27 percent of the Uintah Valley Reservation opened in 1905 and presently owned in fee by nonIndians. Regardless of the outcome of this case, federal and Tribal courts will continue to prosecute Indians on 73 percent of the Uintah Valley Reservation lands retained by the Ute Indian Tribe for its members. Resp. Brief at 9-10. Moreover, because the instant case affects the power of Utah's courts only over Indians, the presence of a nonIndian population on the fee lands larger than the Indian population is simply irrelevant. The Court has frequently observed that "the population on nonIndians on reservations generally is greater than the population of all Indians, both members and non-members . . . " *Duro v. Reina,*

[11] The point we make here – that the unquestioned cession of a Reservation boundary in the Gilsonite Strip in 1888 has nothing to do with the opening of Reservation lands in 1902-1905 is further demonstrated by the Act of April 4, 1910, 36 Stat. 269, terminating certain reclamation lands on the Ute Reservation and the Act of June 15, 1880, 21 Stat. 199, extinguishing the Ute Indians' rights to their Colorado Reservation. In the Act of April 4, 1910, Congress provided that "all right, title and interest of the Indians in the same [reclamation] lands are hereby extinguished. . . . " 36 Stat. at 285, and in the Act of June 15, 1880, Congress ratified an agreement with the Ute Indians where the Indians agreed to "cede to the United States all their territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement." 21 Stat. at 201. These Acts show that Congress knew how to effect a complete surrender of Ute Indian interests and chose not to do so when opening the Uintah Valley Reservation.



495 U.S. 676, 695 (1990). As a result, the Court has made clear that Indian tribes may exert civil or regulatory jurisdiction only over those nonIndians who enter consensual relationships with a tribe or tribal members or whose "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States,* 450 U.S. 544, 566 (1981); *South Dakota v. Bourland,* ___ U.S. ___, 113 S.Ct. 2309, 2320 (1993).[12]

Moreover, there is no real conflict between basic democratic principles and allowing such tribal authority over those non-members who enter the tribal territory. *See,* e.g., Joseph W. Singer, *Sovereignty and Property,* 86 N.W. U. L.Rev. 1, 33-34 (1991). Surely, the nonIndians who took non-allotted lands at Ute and elsewhere under Dawes Act policies, Act of February 8, 1887, 24 Stat. 388, were not ignorant of the tribal presence. The Dawes Act provisions do not "even suggest that Congress intended thereby to terminate" reservations which were opened to nonIndian settlement. *Mattz,* 412 U.S. 481, 497 (1973). A contemporaneous account observed that "[i]t [the Dawes Act] leaves the whole reservation system untouched." Thayer, *The Dawes Bill and the Indians,* 61 Atlantic Monthly 316, 321 (March, 1888).[13] There was only a rather common expectation that "within a generation at most

[12] Moreover, the Court long ago ruled that the Tribes cannot assert criminal jurisdiction over nonIndians, *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978)

[13] This Court's precedents and the contemporaneous accounts of the Dawes Act lay to rest the astonishing thesis of amicus curiae Uintah County, Utah that the Solicitor General has been actively and deliberately attempting to mislead the Court and that the Court has been consistently duped by the Solicitor General's "revisionism." There is simply no rational support for the notion that Solicitor General Bork (who submitted briefs for the United States as amicus curiae in *DeCoteau* and *Rosebud*), Solicitor General Griswold (who submitted a brief for the United States in *Mattz*), and Solicitor General Rankin (who submitted a brief for the United States in *Seymour*) have engaged in such a calculated pattern of deception.

. . . the reservation system would cease to exist." *Solem*, 465 U.S. at 468.[14]

Missing from the fears of Utah and its Amici that tribal power will threaten the nonIndian majority living on 27 percent of the Uintah Valley Reservation lands is *any* concern over the consent of the Indian governed. Contrary to the arguments of Utah and its Amici, the lack of tribal consent to the opening of the Reservation, as is the case here, is a factor to which this Court gives serious consideration. *See, e.g., DeCoteau*, 420 U.S. at 448. Indeed, the rules of statutory construction which require that evidence of Congressional intent to terminate a Reservation be "substantial and compelling" before diminishment is found, *Solem*, 465 U.S. at 472, are based on the fundamental disharmony of plenary Congressional control over people like the Utes who have no effective voice in the government and, indeed, could not vote at the time that Congress was considering opening their Reservation. *See* Richard B. Collins, *Indian Consent to American Government*, 31 Ariz. L. Rev. 365, 379 (1989). In this case, the Utes resolutely refused to consent to any diminution of their reservation, established by Congress in 1864 "for the permanent settlement and exclusive occupation of the Indians"[15] – despite the patently misleading entreaties of Inspector McLaughlin.[16] The Utes, too, had justifiable expectations: that the United States would treat them honorably and

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[14] *Accord Sovereignty and Property, supra*, at 34 ("at the time of the Dawes Act, nonIndian purchasers should have been on notice that they were buying property in Indian country which might be subject to regulation by the Indian nation.") (footnote omitted).

[15] Section 2 of the Act of May 5, 1864, ch. 77, 13 Stat. 64. *Ute Tribe en banc*, 773 F.2d at 1088.

[16] McLaughlin began his "negotiations" by stating that *Lone Wolf v. Hitchcock*, 187 U.S. 553, (1903), held "that Indians have no right to any part of their Reservations except what they may require for allotments in severalty or can make proper use of." Brief for Duchesne County at 335a. *See id.* at 341a. Of course, this court said no such thing. Indeed, for years after *Lone Wolf*, Congress continued to seek the consent of the affected Indians before enacting a statute that reduced the geographic scope of a Reservation. *See* Act of June 30, 1913, ch. 4, 38 Stat. 77, 81-83 (ratifying May 10, 1911, cession agreement with Wiminuche Bank of Southern Ute Indians); Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1078 (ratifying May 28, 1904, cession agreement with Port Madison Tribe); Act of March 3, 1905, Ch. 1452, 33 Stat. 1016 (ratifying April 21, 1904, cession agreement with Shoshone and Arapaho Tribes) [reproduced in Brief of Fremont County, Wyoming, et al.] *See also* 42 Cong. Rec. 7003, 7005 (May 26, 1908) (in debate on S. 1385, later enacted as the Act of May 29, 1908, 35 Stat. 460 [authorizing the Secretary of Interior to sell and dispose of the unallotted lands of the Cheyenne River and Standing Rock Sioux Reservations], Mr. Sherman remarking that an agent had been sent to "ascertain whether it was the desire of the Indians that these lands be opened"). In fact, it was not until after *Lone Wolf*, that Congress specifically directed the Secretary of the Interior to dispatch an Indian inspector to attempt to secure the Utes' consent to allotment of the Uintah Valley Reservation. Consistent with the historical evidence, this Court has only found that Congress carried through with an intent to disestablish lands from a Reservation when the affected Indians consented to such disestablishment. *See Rosebud*, 430 U.S. 584; *DeCoteau*, 420 U.S. 425; *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). When there is no evidence that the Indians consented to disestablishment, this Court has found that no disestablishment occurred. *See Solem*, 465 U.S. 463; *Mattz*, 412 U.S. 481; *Seymour*, 368 U.S. 351.



keep its word. *See Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word.").

To conclude, if this court countenances Utah's volte-face under these circumstances – its "opportunistic misuse of [a] petty criminal prosecution to readjudicate a settled issue . . . for the sole purpose of creating a conflict with the federal courts to force Supreme Court review"[17] – this Court will be working overtime on Reservation diminishment cases, long ago settled (or presumably so) by the federal courts of appeal. Amicus curiae Fremont County, Wyoming will immediately seek a more sympathetic state court forum to relitigate an eleven year old decision which this Court determined was not cert-worthy, *Confederated Salish & Kootenae Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (1982). Amicus curiae Duchesne County – which represented to the Tenth Circuit that its decision would "define, once and for all, the governmental authority of the various parties in the area involved (absent further congressional

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[17] *Perank*, (J.A. 76-81) (Zimmerman, J., dissenting) (J.A. 76-81).

involvement)"[18] – will proceed with a similar strategy to achieve through the Utah Supreme Court and then through this Court a reduction of the Uncompaghre Reservation contrary to *Ute Tribe en banc*. Amici Curiae South Dakota, *et al.*, will not be far behind. This flood of litigation will be the inevitable result of affirmance of the Utah Supreme Court here.

For all of the above reasons, the decision of the Utah Supreme Court should be reversed and the conviction of Robert Hagen dismissed with prejudice.

September 20, 1993

Respectfully submitted,

MARTIN SENECA
Counsel of Record
1820 Michael Faraday Drive
Reston, VA 22090
(703) 471-5474

DANIEL H. ISRAEL
1715 Pearl Street, Suite C
Boulder, CO 80302
(303) 939-8180

*Counsel for Petitioner*

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[18] Reply Brief of Appellee/Cross-Appellant Counties and Cities, at 1, Nos. 81-1827 & 81-1901 (10th Cir.)

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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ROBERT HAGEN, PETITIONER

*v.*

STATE OF UTAH

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*ON WRIT OF CERTIORARI*
*TO THE SUPREME COURT OF UTAH*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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DREW S. DAYS, III
*Solicitor General*

MYLES E. FLINT
*Acting Assistant Attorney General*

EDWIN S. KNEEDLER
*Acting Deputy Solicitor General*

RONALD J. MANN
*Assistant to the Solicitor General*

EDWARD J. SHAWAKER
MARTIN W. MATZEN
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the provisions of the Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, that relate to settlement of non-Indians on the Uintah Indian Reservation altered the boundaries of the Reservation to exclude the lands opened to non-Indian settlement under those Acts.

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-6281

ROBERT HAGEN, PETITIONER

*v.*

STATE OF UTAH

*ON WRIT OF CERTIORARI*
*TO THE SUPREME COURT OF UTAH*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

### INTEREST OF THE UNITED STATES

This case involves the boundaries of the Uintah Indian Reservation. The location of the boundaries affects the scope of the law enforcement obligations and powers of the United States under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. Moreover, because of the United States' special relationship with the Indian Tribes, we have a strong interest in the development of sound principles for determining when a reservation has been diminished or extinguished.

### STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, are reprinted in an appendix to this brief.

## STATEMENT

1. On October 3, 1861, President Lincoln established an Indian Reservation along a river in the Territory of Utah then known as the Uinta, but now referred to as the Duchesne.[1] Executive Order No. 38-1, *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 900 (1904). Congress confirmed the President's action in 1864, providing that the land in question was "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of [the Utah] territory as may be induced to inhabit the same." Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63.

Before the end of the nineteenth century, however, the Uintah Indian Reservation—like many others—became the subject of the "familiar forces" brought to bear by "the desire of non-Indians to settle upon reservation lands." *DeCoteau* v. *District County Court*, 420 U.S. 425, 431-432 (1975). Those forces led to the passage in 1887 of the General Allotment Act, which granted the President authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau*, 420 U.S. at 432 (citing Act of Feb. 8, 1887, ch. 119, 24 Stat. 388).

The first significant step in the move toward allotment of the Uintah Indian Reservation came in 1894, when Congress directed the President to appoint a commission to negotiate with the Indians on the Reservation for the acceptance of allotments and "the relinquishment to the United States of the interest of said Indians in all [unallotted lands]." Act of Aug. 15, 1894, ch. 290, § 22,

[1] Another river now referred to as the Uinta is a tributary of the Duchesne that flows near the eastern boundary of the original Reservation before entering the Duchesne near the southeastern corner of the original Reservation.



28 Stat. 337.[2] Because the matter was not resolved promptly,[3] Congress in 1898 again directed the Secretary to appoint a commission to negotiate an agreement for allotment of Uintah Indian Reservation lands and "cession to the United States" of unallotted lands. Act of June 4, 1898, ch. 376, §§ 1-2, 30 Stat. 429. When the Indians resisted, Senator Rawlins of Utah introduced a series of bills that would have opened the Reservation unilaterally. S. 4867, 55th Cong., 3d Sess. (1898); S. 93, 56th Cong., 1st Sess. (1899); S. 145, 57th Cong., 1st Sess. (1902) (*reproduced in* S. Doc. No. 212, 57th Cong., 1st Sess. 3-4 (1902)); see S. Doc. No. 212, *supra*, at 4-6 (discussing resistance of Indians). Those bills, however, were not enacted.

Instead, in 1902, Congress passed an Act providing that if a majority of the adult male members of the Uintah and White River Indians consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Indian Reservation.[4] The allotments were to be in the amount of 80 acres to each head of a family and 40 acres to each other member of the Tribes. Act of May 27, 1902, ch. 888, § 1, 32 Stat. 263-264 (1902 Act). The 1902 Act also provided that

[2] In 1888, Congress had restored to the public domain a 7,040-acre triangle on the eastern edge of the Uintah Reservation, commonly referred to as the "Gilsonite Strip," because of the deposits of gilsonite found on that tract. Act of May 24, 1888, ch. 310, 25 Stat. 157-158. The status of the Gilsonite Strip is not at issue in this case.

[3] Negotiations with the Uintah Reservation Indians were delayed because of difficulties encountered in negotiating with the Indians on the neighboring Uncompahgre Reservation. See S. Doc. No. 32, 55th Cong., 1st Sess. 2-3 (1897).

[4] The Ute Indian Tribe participating as an amicus in this case includes the descendants of those Indians; it consists of the Uintah, Uncompahgre, and White River Bands of Indians. See Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation 1 (1937).

when the October 1, 1903, deadline for allotments passed, "all the unallotted lands within said reservation shall be restored to the public domain," and that those lands would be subject to entry under the homestead laws, at a rate of $1.25 per acre. 32 Stat. 263. Finally, the 1902 Act provided that the net proceeds of the sale of lands restored to the public domain, "under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians." 32 Stat. 264.[5]

The allotments did not, however, proceed as provided for by the 1902 Act. Accordingly, Congress in 1903 directed the Secretary to allot the land unilaterally if the Indians did not give their consent by June 1 of that year. Act of Mar. 3, 1903, ch. 994, § 1, 32 Stat. 997-998. That Act also extended the time for the "opening [of] the unallotted lands to public entry on said Uintah Reservation" until October 1, 1904. 32 Stat. 998. When the Indians continued to oppose the plan,[6] Congress again deferred the opening date, to March 10, 1905. Act of Apr. 21, 1904, ch. 1402, § 1, 33 Stat. 207-208.

By the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048 (1905 Act), Congress again deferred the time for opening the unallotted lands to public entry, this time to September 1, 1905, unless the President determined that the lands should be opened at an earlier date. Section 1,

[5] A month later, Congress supplemented the 1902 Act with a provision requiring the Secretary,

> [i]n addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Rseervation in the State of Utah, * * * [to] select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902).

[6] Only 82 of the 280 adult male Indians eligible to vote approved the transaction. See H.R. Doc. No. 33, 58th Cong., 1st Sess. 5 (1903).



33 Stat. 1069. The March 1905 Act then specified "the manner of opening such lands for settlement and entry, and for disposing of the same." *Ibid.* Specifically, it provided that the unallotted lands (except for such tracts as might be set aside as a national forest service, and certain mineral lands disposed of in 1902) "shall be disposed of under the general provisions of the homestead and townsite laws of the United States." *Ibid.*[7] All lands "opened to settlement and entry under this Act remaining undisposed of [within five years]" were to "be sold and disposed of for cash, under rules and regulations * * * prescribed by the Secretary of the Interior." 33 Stat. 1070. The proceeds of the sale of unallotted lands were to be applied, in accordance with the 1902 Act, for the benefit of the Indians. 1905 Act, § 1, 33 Stat. 1070.

The government failed to obtain the consent of the Indians to the arrangement. Nevertheless, President Roosevelt issued a Proclamation on July 14, 1905, which declared that "the unallotted lands in [the Uintah Indian] Reservation * * * will on and after the 28th day of August, 1905, * * * be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States." 34 Stat. 3120.[8]

[7] The 1905 Act also authorized the President, before opening the reservation to entry, to set aside additional lands for the Uintah Forest Reserve that had been established adjacent to the Reservation in 1897, as well as for reservoir and other water-supply purposes. 33 Stat. 1070.

[8] On the same day, President Roosevelt, acting pursuant to the 1905 Act, see note 7, *supra*, set aside about 1,010,000 acres within the Reservation as an addition to the Uintah Forest Reserve. 34 Stat. 3116. In 1931, Congress appropriated $1,217,221.25 to compensate the Indians for 973,777 acres of those lands, at the rate of $1.25 per acre. Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092-1093. Congress compensated the Indians for the remainder of the forest reserve lands in 1956 by restoring to the Indians the title to the mineral resources on those remaining lands. Act of July 14, 1956, ch. 603, 70 Stat. 546. Pursuant to the 1905 Act, see note 7, *supra*,

2. In 1989, petitioner was charged with distribution of a controlled substance in the District Court of Duchesne County in Utah. The offense occurred in the town of Myton, which lies within the original exterior boundaries of the Uintah Indian Reservation, in an area that was opened to non-Indian settlement under the 1905 Act. Petitioner initially pleaded guilty. Before sentencing, however, petitioner filed a motion to arrest the judgment and to withdraw his guilty plea; he contended that the trial court did not have jurisdiction because he is an Indian and the crime had been committed in "Indian country" that is not subject to the jurisdiction of the State of Utah.[9] The trial court denied that motion, finding that petitioner is not an

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the President also withdrew certain lands for reservoir purposes, by proclamations issued on August 3 and August 14, 1905. 34 Stat. 3141-3143, 3143-3144. As to those lands, Congress in 1910 appropriated funds to pay the Indians $1.25 per acre, in return for which "[a]ll right, title, and interest of the Indians in the said lands [were t]hereby extinguished." Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285. The last major congressional action with respect to the Reservation came in 1948, when Congress "extended" the "exterior boundary of the Uintah and Ouray Reservation" to include a tract of approximately 510,000 acres, commonly referred to as the "Hill Creek Extension." Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72. The status of the forest reserve land, the reservoir land, and the Hill Creek Extension is not at issue in this case.

[9] The term "Indian country" is defined by 18 U.S.C. 1151 to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." See *Oklahoma Tax Commission* v. *Sac and Fox Nation*, No. 92-259 (May 17, 1993), slip op. 8-11. As a general matter, a State has jurisdiction over an offense committed by or against an Indian in Indian country only where Congress has granted jurisdiction to the States—*e.g.*, in a special jurisdictional statute, see *Negonsott* v. *Samuels*, 113 S. Ct. 1119 (1993), or in Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-590, see *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Utah has not acquired jurisdiction over the Indian country at issue here pursuant to either a special jurisdictional statute or Public Law 280.



Indian for purposes of principles governing state jurisdiction over crimes committed by or against Indians in Indian country. Pet. App. I; see Pet. App. A.

3. The Utah Court of Appeals reversed. *State* v. *Hagen*, 802 P.2d 745 (1990). The court of appeals noted that the Tenth Circuit has held that Myton and other areas opened to non-Indian settlement by the 1905 Act remain within the Uintah Indian Reservation. *Id.* at 747 (citing *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087 (1985) (en banc), cert. denied, 479 U.S. 994 (1986)). The court also concluded that the State failed to introduce sufficient evidence in the trial court to justify a finding that petitioner is not an Indian. 802 P.2d at 747-748. Accordingly, the court reversed petitioner's conviction and ordered him discharged. *Id.* at 748.

4. The Utah Supreme Court granted the State's petition for a writ of certiorari and reversed the Utah Court of Appeals. Pet. App. A1. In a brief opinion, the court explained that it viewed the case as controlled by its decision the same day in *State* v. *Perank*, No. 860243 (July 17, 1992), *reprinted in* Resp. App. 4a-75a.[10] In *Perank*, the Utah Supreme Court concluded that the provisions of the 1902 Act and the 1905 Act opening lands to non-Indian settlement diminished the Uintah Indian Reservation and that the town of Myton accordingly lies outside the boundaries of the Reservation. See *id.* at 28a-63a. Relying on *Perank*, the Utah Supreme Court reinstated petitioner's conviction. Pet. App. A1.

## SUMMARY OF ARGUMENT

A. This Court's decision in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), establishes a clear-statement rule for resolution of claims that Congress has diminished the boundaries of an Indian reservation. Under that rule, an Act of Congress generally does not diminish a reservation unless the Act includes both "[e]xplicit reference to ces-

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[10] "Resp. App." refers to the appendix to the brief of respondent in support of the petition.

sion or other language evidencing the present and total surrender of all tribal interests" and "an unconditional commitment from Congress to compensate the Indian tribe." *Id.* at 470. A limited exception permits a finding of diminishment "[w]hen events surrounding the passage of [the statute] * * * unequivocally reveal a widely held, contemporaneous understanding that [the statute would diminish the reservation]," *id.* at 471; the statute involved in the instance cited in *Solem* for that proposition (unlike the statute at issue here) contained clear language of cession.

B. The Acts at issue here do not satisfy either requirement of the clear-statement rule articulated in *Solem*. First, they do not require unconditional compensation; rather, the compensation was limited to a share of any proceeds the United States would obtain if it was successful in disposing of the opened lands. Second, the statutes do not make any explicit reference to cession, or in any other way state that the Indians were surrendering all of their interests in the opened lands.

The only feature of the statutes that points toward a finding of diminishment is the statement in the 1902 Act that the opened lands were to be "restored to the public domain." Section 1, 32 Stat. 263. But, as the Court in *Solem* explained, such a reference is not sufficient to justify a finding of diminishment, because it could simply mean that the lands in question were returned to the public domain in the sense that they became available for non-Indian settlement; the language does not expressly indicate that the lands were to be removed from the Reservation. See *Solem*, 465 U.S. at 475 n.17. Moreover, even if such a reference might in some circumstances be adequate to justify a finding of diminishment, it would not suffice here because it was included only in the 1902 Act, not the 1905 Act under which the unallotted lands on the Uintah Indian Reservation actually were opened to settlement.

C. This case does not involve the type of widely held understanding that would justify finding a reservation



diminished even though the statute does not satisfy both aspects of the clear-statement rule articulated in *Solem*. Because only Congress has the power to alter the boundaries of a reservation, the only understanding that should suffice is an understanding shared by Congress and the affected Indians. In this case, there is no basis for supposing that the Indians understood the 1905 Act would alter the boundaries of the Reservation, nor is there any explicit statement in the legislative history that the 1905 Act would have that effect. Accordingly, there is no basis for further investigation of secondary materials. In any event, because those materials are rife with inconsistency and contradiction, they cannot "unequivocally" reveal a widely held understanding sufficient to diminish the Reservation. *Solem*, 465 U.S. at 471.

## ARGUMENT

### THE UINTAH INDIAN RESERVATION WAS NOT DIMINISHED BY THE 1905 ACT OR ITS 1902 PREDECESSOR

#### A. A Reservation Is Diminished Only When Congress Enacts A Statute Using Unambiguous Language Of Cession, And Either Congress Grants Unconditional Compensation To The Indians, Or There Is An Unequivocal And Widely Held Contemporaneous Understanding That The Reservation Is Diminished

Like several of this Court's previous cases, the present controversy turns on the effect of a surplus land Act opening an Indian reservation to settlement by non-Indians. The Congress that passed that Act (and others like it) no doubt anticipated the eventual demise of the reservation system. But the Court has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus

land acts diminished reservations,[11] and other surplus land Acts did not.[12]'" *Solem* v. *Bartlett*, 465 U.S. 463, 468-469 (1984) (citations omitted).[13] As explained in *Solem*, the Court's prior decisions have established a "fairly clean analytical structure" for distinguishing those surplus land Acts that of their own force effected an immediate diminishment of the reservation from those that permitted non-Indians to purchase land within an existing reservation and left to another day the actual redrawing of its boundaries. *Id.* at 470.

The "first and governing principle" is that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The dispositive question, then, is whether "Congress [has] clearly evince[d] an intent to change boundaries." *Ibid.* (internal quotation marks,

[11] See, *e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975).

[12] See, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

[13] As the Court noted in *Solem*, the precise location of reservation boundaries "seemed unimportant" at the time the surplus land Acts were passed. 465 U.S. at 468. Until 1913, Indian title, not the reservation boundary, generally determined which sovereign had jurisdiction over a particular tract of land. See, *e.g.*, *Bates* v. *Clark*, 95 U.S. 204, 208-209 (1877); *Ex parte Crow Dog*, 109 U.S. 556, 560-462 (1883). In 1913, however, this Court initiated an expansion of the judicial definition of Indian country to include lands that had been reserved and set apart as an Indian reservation by Executive Order, even though they were not owned by Indians. *Donnelly* v. *United States*, 228 U.S. 243, 268-269 (1913). The expansion culminated in 1948, when Congress enacted a statutory definition of Indian country that includes lands held in fee by non-Indians within reservation boundaries. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. 1151(a)); see generally *Solem*, 465 U.S. at 468 (summarizing the expansion of the concept of Indian country).



ellipses, and citation omitted). The most probative evidence bearing on that question is the statutory language used to open the reservation. Language that "[e]xplicit[ly] refer[s] to cession" or otherwise "evidenc[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress meant to sever it from the reservation. *Ibid.* When such language is buttressed by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* at 470-471.[14]

Cession language and unconditional compensation are not, however, absolute prerequisites to a finding of diminishment. As explained in *Solem*, "[w]hen events surrounding the passage of a surplus land Act * * * unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the Court has inferred that Congress shared that understanding and intended to diminish the reservation. *Solem*, 465 U.S. at 471. That portion of the *Solem* opinion was explaining the holding in *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977).[15] In that case, the Court concluded that a reservation had been diminished by a statute that, although it contained language of cession, did not offer payment to the Indians of a sum certain as compensation; the *Rosebud* Court relied heavily on the fact that the statute

[14] In the presence of both of those factors, the Court found a reservation to have been extinguished in *DeCoteau* v. *District County Court*, 420 U.S. 425, 431-449 (1975). In the presence of neither factor, the Court found reservations not to have been diminished in *Solem*, 465 U.S. at 472-476; *Mattz* v. *Arnett*, 412 U.S. 481, 494-505 (1973); and *Seymour* v. *Superintendent*, 368 U.S. 351, 355-356 (1962).

[15] See *Solem*, 465 U.S. at 471 (stating that "our opinion in *Rosebud Sioux Tribe* demonstrates" the accuracy of the discussion at hand).

was designed to implement an agreement with the Indians that used language of cession and indisputably provided for diminishment of the reservation. See *id.* at 591-595. The *Solem* Court made clear, however, that the holding in *Rosebud* was not to be given broad application, emphasizing that "[t]here are * * * limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act,"—limits that require "substantial and compelling evidence of a congressional intention" to diminish in order to justify a ruling that a reservation has been diminished. 465 U.S. at 472. That requirement is consistent with the general rule that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *South Dakota* v. *Bourland*, No. 91-2051 (June 14, 1993), slip op. 7 (quoting *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 693 (1992)).

**B. Neither The 1905 Act Nor Its 1902 Predecessor Contained A Provision For Unconditional Compensation Of The Indians Or Language Of Cession**

**1. *The 1905 Act And The 1902 Act Did Not Provide For Payment Of A Sum Certain To The Indians***

As the Court has explained, an important indicator of congressional intent to alter reservation boundaries is the contemporaneous appropriation of funds to provide unconditional compensation—payment of a "sum certain" [16]—to the Indians for the lands being opened to settlement. See *Solem*, 465 U.S. at 470-471. Neither the 1905 Act nor the predecessor 1902 Act providing for the opening of unallotted lands on the Uintah Indian Reservation furnished unconditional compensation to the Tribe. As mentioned above, the sole compensation offered

[16] See *Solem*, 465 U.S. at 469 n.10; *Rosebud*, 430 U.S. at 598 n.20; *DeCoteau*, 420 U.S. at 446, 448.



the Indians was to come from whatever proceeds the government might obtain from the disposition of the unallotted lands. 1905 Act, § 1, 33 Stat. 1070 (incorporating by reference the provisions for application of the proceeds in Section 1 of the 1902 Act, 32 Stat. 264).[17] Hence, the government was under no obligation to compensate the Indians at all unless it was successful in disposing of the unallotted lands.[18]

The discussion of the payment mechanism in this Court's earlier decisions makes it clear that the arrangement for the Uintah Indian Reservation was not the type of unconditional compensation or sum-certain payment that suggests an intention on the part of Congress to diminish a reservation.[19] The method of compensation

[17] That conditional payment obligation differs from the compensation later made by the United States for the forest reserve and reservoir lands discussed in note 8, *supra*. See also 32 Stat. 264 (provision of the 1902 Act providing that $70,064.48 was "to be paid to the Uintah and White River Utes" to cover various claims of the Indians against the United States, if those Indians consented to the allotment described in the 1902 Act).

[18] The legislative history suggests that Congress clearly understood the difference between the two modes of payment, and understood that the Indians had a strong preference for unconditional compensation. The Commissioner of Indian Affairs testified at a hearing before the Senate Committee on Indian Affairs:

> It will make a great difference in negotiating with [the Indians on the Uintah Indian Reservation] whether you propose to pay a cash amount or pay them as the land is sold. The system of paying the Indians for land as it is being sold has not proved the success it was hoped it would be. The Indians are afraid of it. But, generally speaking, the Indians will under certain conditions consent to sell their land if they are paid a cash sum.

S. Doc. No. 212, 57th Cong., 1st Sess. 5 (1902).

[19] See *Solem*, 465 U.S. at 469 n.10 (describing statute at issue in *Seymour* v. *Superintendent*, 368 U.S. 351, 356 (1962), under which "the Colville Tribe received whatever proceeds these sales generated, rather than a sum certain"); *ibid.* (distinguishing

closely resembles the arrangements under the statutes that were found not to have effected a diminishment in *Solem*, 465 U.S. at 473; *Mattz* v. *Arnett*, 412 U.S. 481, 495 (1973); and *Seymour* v. *Superintendent*, 368 U.S. 351, 355-356 (1962). See *DeCoteau* v. *District County Court*, 420 U.S. 425, 447-449 (1975) (discussing that aspect of *Mattz* and *Seymour*).[20] Accordingly, the lack of unconditional compensation suggests that neither the 1905 Act nor its 1902 predecessor altered the boundaries of the Uintah Indian Reservation.[21]

### 2. *Neither the 1905 Act Nor Its 1902 Predecessor Contained Language Of Cession*

a. *The Act of March 3, 1905.*—Analysis of the relevant statutory language begins with the 1905 Act, the statute under which President Roosevelt opened a portion

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between "sum-certain payment" and "a provision guaranteeing the Tribe only the proceeds from the sale of the opened lands"); *DeCoteau*, 420 U.S. at 448 (describing "contrast" between agreement providing for "a sum certain" and agreement that "benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers"); *ibid.* (describing contrast between statute that "provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefits" and "a straightforward agreement ceding lands to the Government for a sum certain").

[20] A statute involving a similar conditional compensation arrangement was found adequate to diminish a reservation in *Rosebud*. But the statute at issue in *Rosebud* contained explicit language of cession and, as *Solem* explains, further rested on the existence of a "widely held, contemporaneous understanding" sufficient to justify diminishment even where the statute itself did not satisfy the normal requirements for a finding of congressional intent to diminish. 465 U.S. at 471-472. We discuss *Rosebud* at length in Point C, *infra*.

[21] Cf. *Ash Sheep Company* v. *United States*, 252 U.S. 159, 164-166 (1920) (Indians retain equitable interest in lands ceded to United States where United States undertook to sell lands for benefit of the Indians).



of the Reservation to non-Indian settlement. It was in the 1905 Act that Congress specified "the manner of opening [unallotted] lands for settlement and entry, and for disposing of the same." Section 1, 33 Stat. 1069. In particular, the 1905 Act provided that the "unallotted lands on the Uintah Reservation * * * shall be disposed of under the general provisions of the homestead and town-site laws of the United States." *Ibid.* That language does not refer to a "cession" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the opened lands. *Solem*, 465 U.S. at 470. Rather, it closely resembles the language of the statutes at issue in *Solem*, *Seymour*, and *Mattz*.[22] As a unanimous Court explained in each of those cases, such statutes did not terminate the reservation, but merely "open[ed] the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Seymour*, 368 U.S. at 356 (quoted in *Mattz*, 412 U.S. at 497, and in *Solem*, 465 U.S. at 473).

The operative language here and in those cases contrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud*, the two recent cases in which the Court has found that reservation boundaries were altered by Congress. See *DeCoteau*, 420 U.S. at 445 (statute

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[22] See Act of June 17, 1892, ch. 120, 27 Stat. 52 (Act at issue in *Mattz*, providing that excess lands were "subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands"); Act of Mar. 22, 1906, ch. 1126, § 3, 34 Stat. 81 (Act at issue in *Seymour*, providing that excess lands "shall be open to settlement and entry under the provisions of the homestead laws"); Act of May 29, 1908, ch. 218, § 2, 35 Stat. 461 (Act at issue in *Solem*, providing for the disposition of unallotted lands under the "general provisions of the homestead and town-site laws of the United States").

provided that the Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands," Act of Mar. 3, 1891, ch. 543, 26 Stat. 1036); *Rosebud*, 430 U.S. at 596-597 (statute provided that Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted," Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254). In sum, the 1905 Act contains neither an "[e]xplicit reference to cession" nor any other "language evidencing the present and total surrender of all tribal interests" in the portion of the Reservation opened to non-Indian settlement. Accordingly, under *Solem*, it fails to demonstrate a clear congressional intention to alter the boundaries of the Uintah Indian Reservation.

b. *The Act of May 27, 1902.*—The 1902 Act likewise does not contain language demonstrating that Congress provided for the total surrender of all tribal interests in the portions of the Reservation that were opened to non-Indian settlement. Like the 1905 Act, the 1902 Act does not refer to any cession, sale, extinguishment, or conveyance of tribal lands.

The 1902 Act did state that unallotted lands eventually would "be restored to the public domain." Section 1, 32 Stat. 263. As the Court explained in *Solem*, a statement that lands have been restored to the public domain can point in the direction of diminishment, on the understanding that lands set aside in a reservation are, in some sense, removed from the public domain. Indeed, the 1902 Act's reference to "restor[ation] to the public domain" was the principal basis for the decision of the Utah Supreme Court in *Perank*, Resp. App. 20a-28a, on which that court relied in this case. In our view, however, the Utah Supreme Court gave insufficient deference to this Court's decision in *Solem*, the most recent occasion on which this Court considered the effect of a statute referring to a res-



toration of reservation lands to the public domain.[23] In *Solem*, the Court characterized such a reference as "hardly dispositive," noting that "even without diminishment, unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." 465 U.S. at 475 & n.17;[24] see also *Newhall*

[23] The Utah Supreme Court in *Perank* also relied on passages in this Court's opinions in *Seymour* and *Rosebud*. Resp. App. 20a-21a. Neither passage was related directly to the issues before the Court in those cases. In any event, even if they are taken at face value, neither reference would shed much light on the statute at issue here. First, the Court in *Seymour* referred in passing to a statute not at issue in the case, which had "vacated and restored to the public domain" a portion of the reservation at issue. 368 U.S. at 354 (quoting Act of July 1, 1892, ch. 140, § 1, 27 Stat. 63). The Court implicitly assumed that the 1892 Act had diminished the boundaries of the reservation. That comment does not shed much light on the meaning of the 1905 Act, which does not use the term "vacated," a term that expresses a concept of extinguishment completely absent from the language at issue here.

Similarly, the *Rosebud* Court accepted the parties' understanding that the Act of March 2, 1889, ch. 405, § 21, 25 Stat. 896, terminated a portion of the Great Sioux Reservation by providing that it was "restored to the public domain." 430 U.S. at 589 & n.5. As the Court noted, however, that termination was accomplished with the agreement of three-fourths of the adult male Indians on the Reservation, as required by the treaty between the United States and the Sioux Nation. See *ibid.* If diminishment were found here, it would have occurred without the consent of the Indians. Moreover, the overall thrust of the 1889 Act concerning the Great Sioux Reservation, as set forth in its title, was to divide the Reservation "into separate reservations and to secure the relinquishment of the Indian title to the remainder," 25 Stat. 888 (see *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987)), and the land restored to the public domain was that lying "outside of the separate reservations," § 21, 25 Stat. 896. The substitution of six smaller reservations for the single Great Sioux Reservation, and the assignment of individual Sioux members to one of the six reservations (see §§ 1-6, 16), was the functional equivalent of the cession of the remainder.

[24] Significantly, the "public domain" argument rejected by the Court in *Solem* was advanced not only by the petitioner in that case, but also by the Counties of Duchesne and Uintah, Utah, which

v. *Sanger*, 92 U.S. 761, 763 (1876) ("The words 'public lands' are habitually used * * * to describe such as are subject to sale or other disposal under general laws.").[25]

Moreover, even if a reference to the "public domain" might in some circumstances be sufficient to justify a finding of diminishment, Congress's omission of that phrase from the 1905 Act makes it particularly inappropriate to place significant weight on the reference in this case. As discussed above, the 1902 Act—in which the only reference to the "public domain" appears—conditioned implementation on the consent of the Indians. Section 1, 32 Stat. 263-264. Despite several extensions, that consent was not forthcoming. Notwithstanding the absence of consent, Congress finally provided in the 1905 Act for the allotment and subsequent opening of surplus lands to non-Indian settlement. Significantly, however, the 1905 Act, under which the Reservation was opened, did not carry forward the 1902 Act's reference to the "public domain"; instead, the 1905 Act itself specified "the manner of opening [unallotted] lands for settlement and entry," substituting a more detailed statement that the lands would be "disposed of under the general provisions of the homestead and town-site laws of the United States." Compare 1902 Act, § 1, 32 Stat. 263, with 1905 Act,

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appeared as amici, presumably because of the reference to the public domain in the 1902 Act concerning the Uintah Reservation. See 465 U.S. at 475 n.16.

[25] Cf. *Utah Division of State Lands* v. *United States*, 482 U.S. 193, 206 (1987); *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 548-549 n.15 (1987). In evaluating the significance of a reference to lands being in the "public domain," it is important to recall that at the time the statute containing that reference was enacted, the question whether the opened lands continued to be a portion of the reservation would have had little practical significance; it would not, for example, have affected criminal jurisdiction. See note 13, *supra*.



§ 1, 33 Stat. 1069.[26] As in earlier cases in which Congress failed to enact bills that more clearly suggested an intent to diminish or disestablish a reservation, Congress's abandonment of the public domain language suggests that any effort "to terminate the reservation * * * failed completely." *Mattz*, 412 U.S. at 504.[27]

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[26] The differences between the two statutes are not limited to the deletion of the reference to the "public domain." Under the 1902 Act, Congress provided that "*all the unallotted lands* within said reservation *shall be restored to the public domain.*" 32 Stat. 263 (emphasis supplied). The 1905 Act, by contrast, provided more generally that the "unallotted lands [except for mineral lands and lands for a forest reserve] shall be disposed of [under the homestead laws] and shall be opened to settlement and entry by proclamation of the President," 33 Stat. 1069, and also authorized the President to set aside lands "necessary to conserve and protect the water supply for the Indians or for general agricultural development," 33 Stat. 1070.

[27] The proposition that Congress retreated in the face of continued opposition on the part of the Ute Indians on the Uintah Indian Reservation is supported by Congress's continued efforts to gain that consent over a period of several years. See S. Doc. No. 212, 57th Cong., 1st Sess. 4 (1902) (statement of Commissioner of Indian Affairs at congressional hearing of his "understand[ing] that there is a treaty arrangement with those Indians which will make it necessary for you to treat with them before it can be thrown open to settlement"); see *id.* at 5 (discussing failure of previous negotiations). Those persistent negotiating efforts contrast favorably with Congress's treatment of the neighboring Uncompahgre Indians, with respect to whom Congress—in the same statute that appointed the first commission to seek consent from the Ute Indians—authorized unilateral and immediate allotment. See Act of Aug. 15, 1894, ch. 290, § 20, 28 Stat. 337-338. As a contemporary House Report explained, the difference in treatment rested on Congress's view that the Uncompahgres had only "the privilege of temporary occupancy," while the Uintah Reservation Indians were "the owners of the lands within the reservation, because * * * it was provided that the lands within the Uintah Reservation should be 'set apart for the permanent settlement and exclusive occupation of the Indians.'" H.R. Rep. No. 660, 53d

At bottom the Utah Supreme Court's analysis rests on the conclusion that the 1905 Act evidenced an intent to diminish the Uintah Indian Reservation by implicitly incorporating a phrase from the 1902 Act. Given the omission of that phrase from the 1905 Act, the failure of the conditions on which the 1902 Act was predicated, and the ambiguity of the phrase in the first place, the use of the phrase "public domain" in the 1902 Act fails to carry the State's burden of showing "that Congress clearly evince[d] an intent to change [the] boundaries" of the Reservation. *Solem*, 465 U.S. at 470 (internal quotation marks, ellipses, and citation omitted).[28]

### C. The 1905 Act And The 1902 Act Do Not Reflect An Unequivocal And Widely Held Contemporaneous Understanding That They Would Diminish The Uintah Indian Reservation

Relying on the decision in *Rosebud*, the Court stated in *Solem* that in some cases a statute will be held to diminish or extinguish an Indian reservation even if it does not bear all of the usual marks of such a statute—express language of cession and unconditional compensation for the Indians. In the words of the *Solem* Court, that result is appropriate

Cong., 2d Sess. 1, 2-3 (1894) (quoting Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63).

[28] An additional feature of the statutes that suggests they were not intended to alter the boundaries of the reservation is the absence of a specific statutory description of the land that was, in respondent's view, removed from the Reservation. In *DeCoteau* and *Rosebud*, the relevant statutes precisely described the areas that were found to have been removed from reservation status; the finding of diminishment in those cases therefore comported with the requirement that Congress itself must "clearly evince an 'intent . . . to change . . . boundaries.'" *Solem*, 465 U.S. at 470 (quoting *Rosebud*, 430 U.S. at 615). By contrast, in this case Congress did not describe the areas of the Uintah Indian Reservation that were to be opened to non-Indian settlement, but instead left it to the Executive Branch to identify such lands in the future.



> [w]hen events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.

465 U.S. at 471.

The circumstances of *Rosebud* that were held sufficient to justify diminishment illustrate the narrowness of that exception to the general rule. *Rosebud* involved an unequivocal and universally shared understanding among the participants to the transaction that the statute in question (the Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254) would diminish the boundaries of the Rosebud Sioux Reservation. In particular, it is clear that the Indians had agreed to a diminishment of the Reservation; in 1901, three-fourths of the adult male Indians on the Rosebud Sioux Reservation had executed an agreement (negotiated by Inspector James McLaughlin)[29] under which they would "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to" the land in question, in return for an unconditional payment of just over $1,000,000. See *Rosebud*, 430 U.S. at 590-591 & n.8.[30] Because Congress was unwilling to agree to outright payment for the lands, Inspector McLaughlin

[29] Interestingly, Inspector McLaughlin also conducted the unsuccessful negotiations with the Sioux Indians over the land at issue in *Solem*, see 465 U.S. at 476-477, and with the Ute Indians over the land at issue in this case, see H.R. Doc. No. 33, 58th Cong., 1st Sess. 3-7 (1923) (report by Inspector McLaughlin of unsuccessful negotiations).

[30] The applicable treaty with the Sioux Indian Nation provided that no treaty for cession of any part of its reservation would be valid without the consent of three-fourths of the adult male Indians on that reservation. See *Rosebud*, 430 U.S. at 589.

returned to that Reservation to renegotiate the agreement. See *id.* at 591-592. Although he failed to secure the consent of three-fourths of the adult male Indians, he did secure the consent of a simple majority to a 1903 agreement that—using the same language of cession as the 1901 agreement—made payment contingent upon successful sale of the land, with the compensation per acre raised from $2.50 to $2.75. See *id.* at 592-594. Congress promptly enacted a statute that set forth the 1901 agreement in its entirety, and then "accepted, ratified, and confirmed [that Agreement] as * * * amended and modified" to delete the obligation of unconditional compensation. Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254-256; see *Rosebud*, 430 U.S. at 594-597.

As the *Rosebud* Court explained, a ruling that the Rosebud Sioux Reservation was not diminished by the 1904 Act at issue there could only have frustrated congressional intent. The statute used unequivocal language of cession, and adopted an agreement of the Indians that unequivocally approved the cession (albeit with modifications approved by only a simple majority of the adult male Indians). Inspector McLaughlin advised the Indians in unambiguous language that both the 1901 and the 1903 Agreements, if enacted by Congress, would alter the boundaries of the Reservation. See *Rosebud*, 430 U.S. at 591-593. The legislative history reviewed by the Court contained "no indication that Congress intended to change anything [from the 1901 Agreement] other than the form of, and responsibility for, payment," *id.* at 594-595, and the House Report in fact flatly stated that the bill would "ratify and amend an agreement * * * providing for the cession to the United States of the unallotted portion of [the Indians'] lands," see *id.* at 595 (quoting H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904)).

Application of the *Rosebud* analysis to this case shows that whatever the desires of individual Members of Congress, there is no evidence—let alone unequivocal evi-



dence—of a widely held contemporaneous understanding that the opened lands would be removed from the Uintah Indian Reservation. First, there is no document in this case that establishes the "unmistakable baseline purpose of disestablishment" that was so important to the Court in *Rosebud*, 430 U.S. at 592; none of the relevant documents—the 1905 Act, the previous Acts dealing with the Reservation, or any agreement with the Indians—uses the indisputable language of cession that was a feature of all of the relevant documents in *Rosebud*. Moreover, in our view, the requirement in *Solem* that the "understanding" be "widely held" requires proof that the Indians shared in an understanding that alteration of the Reservation's boundaries was at hand; the only obvious manifestation of such an understanding on the part of the Indians is an agreement of cession, like the one approved in *Rosebud*. Because the Indians in this case steadfastly refused to consent to any alteration of the Reservation boundaries, there is no such agreement in this case.[31] Accord-

[31] Indeed, as Inspector McLaughlin explained, the Indians on the Uintah Indian Reservation firmly believed "that their reservation could not be opened to settlement without their consent," and that "they were thus advised by officials of the Department [of the Interior] during their visit to Washington." H.R. Doc. No. 33, 58th Cong., 1st Sess. 5 (1903). The view of the Indians was not entirely unreasonable, considering the date of the negotiations in question—May 1903, only four months after this Court's January 1903 decision in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 566-568, first upheld the power of Congress to diminish a reservation unilaterally.

Given the Indians' view on that question, the Utah Supreme Court erred in relying (Resp. App. 37a) on Inspector McLaughlin's advice to the Indians that "there will be no outside boundary line to this reservation." Minutes of Council Meetings Between Inspector McLaughlin and the Ute Indians 42 (May 18-23, 1903), JX 162. ("JX" refers to the joint exhibits of the parties in *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072 (D. Utah 1981); the parties have stipulated that the record in this case includes the record in the *Ute Indian* case, see Resp. App. 164a-165a.) In any event, the Indians' response to Inspector McLaughlin's advice was to reject

ingly, it would be inappropriate to rely on "understandings" to conclude that the Reservation was diminished.

The Utah Supreme Court's contrary conclusion rested to a considerable degree on its understanding of a variety of materials regarding the contemporaneous and subsequent understanding of the 1902 and 1905 Acts. Resp. App. 44a-61a. For two reasons, we do not believe that those materials support the decision of the court below. First, although the Court's decision in this area frequently have mentioned such materials, we believe they have at best only limited relevance. See *Solem*, 465 U.S. at 471 (noting that the Court has considered such materials relevant "[t]o a lesser extent" than the statutory text and other sources discussed above).[32] The suggestion of the *Solem* Court that a widely held, contemporaneous understanding in some cases could be sufficient to justify a finding of diminishment was not a license for the lower courts to conduct a wide-ranging investigation into the views that individual legislators and administrative officials took of legislation. Because only Congress and the Indian Tribes have the power to alter the limits of a Tribe's sovereignty, it is not appropriate to rest decisions regarding those limits on the views of third parties who could not themselves alter those limits.

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the proposal by an overwhelming margin, see note 6, *supra*. Because the allotment program under the 1902 Act was conditioned on the Indians' consent, it failed and was replaced by the program set forth in the 1905 Act, at issue here. There is no suggestion that any representative of the government advised the Indians that the 1905 Act would alter the boundaries of the Reservation.

[32] Moreover, it is not clear that such secondary materials have affected any of the Court's recent holdings in the area. As we explained in note 14, *supra*, all of the Court's recent decisions other than *Rosebud* can be explained by the bright-line rule articulated in *Solem*; and, as discussed above, *Rosebud* itself appears to rest primarily on the terms of congressional enactments and tribal agreements, rather than on the understanding other parties had of those documents.



Second, we do not believe that the historical record supports the Utah Supreme Court's view that both Congress and the Executive Branch understood the 1902 and 1905 Acts to alter the boundaries of the Uintah Indian Reservation. Rather, the historical record here, as in *Solem*, is "so rife with contradictions and inconsistencies as to be of no help to either side." 465 U.S. at 478. Most of the materials on which the Utah Supreme Court relied are ambiguous, indicating only that the land in question was to be restored to the "public domain."[33] As discussed above, such references, even in the opening statute itself, do not directly address the question at issue in this case.

To be sure, a few federal statutes enacted shortly after the 1905 Act referred to the Reservation as having been diminished by the 1902 and 1905 Acts.[34] But a number of other statutes apparently rested on the contrary assumption that the Reservation was not diminished by the 1902 and 1905 Acts.[35] Still other statutes referred to

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[33] See, *e.g.*, Resp. App. 45a-46a (President Roosevelt's Proclamations), 51a-52a (subsequent statements of officials in the Department of the Interior), 54a-55a (1971 order of the Department of the Interior), 57a-60a (subsequent judicial decisions).

[34] Act of Jan. 27, 1906, ch. 7, 34 Stat. 9 (referring to "lands which were heretofore a part of the Uintah Indian Reservation"); Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285 (referring to "lands within the ceded Uintah Indian Reservation"); Act of July 20, 1912, ch. 244, § 1, 37 Stat. 196 (referring to "land which was formerly a part of the Uintah Indian Reservation"). As the Court in *Solem* explained in a similar context, those references may well have been referring to land as having left the common lands of the Reservation, rather than having left the Reservation entirely. 465 U.S. at 475 n.17.

[35] Act of Aug. 1, 1914, ch. 222, § 21, 38 Stat. 604 (referring to "the bridge at Myton, on the Uintah Indian Reservation"); Act of Mar. 4, 1929, ch. 705, § 1, 45 Stat. 1584 (referring to "the State Experimental Farm * * * within the Uintah and Ouray Indian Reservation"); Act of Apr. 22, 1932, ch. 125, § 1, 47 Stat. 111 (same). Similarly, two statutes referred to an extension of the

the "former" Reservation, a reference that cannot be correct, because all agree that at least the allotted parcels continued to constitute a reservation.[36] Finally, on some occasions contradictory references were included in the same Act.[37] As in *Solem*, the ready availability of "ex-

"exterior boundary" of the Reservation, a reference that assumes the Reservation remained a cohesive whole including the opened lands. Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72; Act of Aug. 9, 1955, ch. 263, 69 Stat. 544. See generally *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072, 1133-1134 (D. Utah 1981) (cataloguing legislative materials that assume the opened lands remain in the reservation), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

An extensive number of statutes referred to the Reservation as continuing in existence. Act of Mar. 3, 1921, ch. 119, § 21, 41 Stat. 1245 (obligation to construct bridge "free from all expense to the * * * Indians of the Uintah and Ouray Reservation"); Act of Mar. 4, 1931, ch. 522, 46 Stat. 1567 (appropriation for "[i]rrigation system, Uintah Reservation"); Act of Feb. 2, 1932, ch. 12, 47 Stat. 22 (same); Act of June 19, 1934, ch. 648, § 1, 48 Stat. 1033 (same); Act of Aug. 9, 1937, ch. 570, § 1, 50 Stat. 573 (referring to funds "apportioned to the Indians of the Uintah and Ouray Reservation"); Act of Mar. 16, 1950, ch. 59, 64 Stat. 19 (referring to the "Ute Indian Tribe of the Uintah and Ouray Reservation"); Act of Aug. 21, 1951, ch. 338, §§ 1-2, 65 Stat. 194 (same); Act of Aug. 27, 1954, ch. 1009, §§ 1-2, 68 Stat. 868 (same); Act of July 14, 1956, ch. 603, §§ 1-5, 70 Stat. 546-547 (same).

[36] Act of June 21, 1906, ch. 3504, 34 Stat. 375 ("former Uintah Reservation"); Act of June 29, 1906, ch. 3599, 34 Stat. 611 ("former Uintah Indian Reservation"); Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285 ("former Uintah Reservation"); Act of May 14, 1920, ch. 187, 41 Stat. 599-600 ("former Uintah Indian Reservation"); see also Presidential Proclamation of Sept. 1, 1906, 34 Stat. 3228 (referring to the "former Uintah Indian Reservation"). Indeed, one statute referred to the "allotted lands of any Indian of the former Uintah * * * reservation," Act of Apr. 30, 1908, ch. 153, 35 Stat. 95, a reference that can make sense only on the understanding that the allotted lands had left the "reservation" in the general (though inaccurate) sense that they were no longer common lands set aside for and beneficially held by a tribe.

[37] Section 21 of the Act of Mar. 3, 1911, ch. 210, 36 Stat. 1073-1074, refers at one point to persons having made "homestead



amples pointing in both directions leave[s] one with the distinct impression that subsequent Congresses had no clear view whether the opened territories were or were not still part of the * * * Reservation." 465 U.S. at 479.[38] Given the hazards involved in attempting to infer the intent of one Congress from the views of subsequent Congresses, see *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980), the inconsistent references contribute nothing of substance to the decision of this case.

Finally, the Utah Supreme Court relied on its belief that the Department of the Interior had treated the 1902 and 1905 Acts as having diminished the Reservation. See Resp. App. 52a-56a, 57a n.27. As with the statutory materials, many of the items on which the court relied do not address the question at hand.[39] The two formal

entry for land in the Uintah Indian Reservation"—a reference that assumes the opened lands remained in the Reservation—and later on the same page refers to "the proceeds of the sale of lands within the ceded Uintah Indian Reservation"—a reference that appears to rest on the opposite assumption. Similarly, the Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285, which compensated the Indians for land set apart for reservoir purposes, see note 8, *supra*, refers to those lands as lying "in the former Uintah Indian Reservation," but later in the same paragraph states that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished."

[38] To the extent conclusions can be drawn from the legislative record, it appears that Utah's Senators Sutherland and Smoot were the principal sources of references suggesting that the 1902 and 1905 Acts had diminished the Reservation. Such references ceased shortly after Senator Sutherland's departure from the Senate in 1917. See *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072, 1133 (D. Utah 1981), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

[39] The bulk of the materials the court cites at Resp. App. 57a n.27 do nothing more than refer incorrectly to the "former" Uintah Indian Reservation. See H.R. Rep. No. 5010, 59th Cong., 1st Sess. 1-2 (1906); Letter from C.F. Darrabee, Acting Commissioner of

notices of the Secretary on which the court relied are as ambiguous as much of the statutory material, although on balance they seem to support our understanding.[40] To be sure, some of the items do include statements by lower level officials in the Department of the Interior indicating that the lands opened to non-Indian settlement under the 1905 Act were removed from the Reservation.[41] But, in

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Indian Affairs, to H.C. Means (Sept. 26, 1907), JX 336; Letter from First Assistant Secretary of the Department of the Interior to Commissioner of Indian Affairs (Nov. 8, 1907), JX 338; Letter from Secretary of the Department of the Interior to Secretary of the Treasury (Dec. 19, 1908), JX 341. Moreover, given the limited information contained in those documents, it is difficult to ascertain whether the documents involved portions of the Reservation that were opened to settlement under the 1905 Act, rather than land that might have been affected by one of the other actions Congress had taken with respect to the Reservation.

[40] Although the 1945 Order Notice, 10 Fed. Reg. 12,409, discussed at length at Resp. App. 52a-54a, does state at one point that the lands not sold pursuant to the 1902 and 1905 Acts should be "added to and made a part of the existing reservation," at an earlier point it describes those lands as "lands which are now or may hereafter be classified as undisposed-of opened lands *of the Uintah and Ouray Reservation.*" *Ibid.* (emphasis added). The latter reference rests on the assumption that the lands in question had never been severed from the Reservation. Similarly, the 1971 Order Notice, 36 Fed. Reg. 19,920, states that the lands in question "were restored to the public domain"; it does not state that they were severed from the Reservation. Indeed, the notice refers at another point to "the undisposed-of opened lands of said reservation" being "restored to tribal ownership," suggesting that the opening of the lands had altered ownership but not severed the lands from the Reservation. *Ibid.* For a similar reference, see Commissioner of Indian Affairs, *Annual Report* 44 (1918), JX 394 (referring to "areas of unallotted land within this reservation" that had been opened to homestead entry).

[41] 1929 Annual Report of Uintah and Ouray Agent 1, JX 420; 1931 Annual Report of Uintah and Ouray Agent 4-6, JX 425; 1932 Annual Report of Uintah and Ouray Agent 1-2, JX 427; Bureau of Indian Affairs, Phoenix Area Office, *Information Profiles of Indian Reservations in Arizona, Nevada, & Utah* 151, 155 (1976), JX 480.



light of the inconsistent practice of Congress and the Secretary, there is no basis for relying on those statements to provide a definitive resolution of the question against the Tribe.

* * * *

At bottom, the 1902 and 1905 Acts do not contain the clear expression of intent to change the Reservation's boundaries that this Court's cases have required. Nor can the State establish the type of widely shared understanding of the effect of those Acts that would justify treating the Acts as going farther than the terms Congress chose to express its action. The Tribe consistently refused to consent to any alteration of the Reservation's boundaries, and Congress never adopted any statute explicitly attempting to alter the boundaries unilaterally. Accordingly, this Court should hold that the Reservation was not diminished by the provisions of the 1905 Act, and its 1902 predecessor, that opened portions of the Reservation to non-Indian settlement.

## CONCLUSION

The judgment of the Supreme Court of Utah should be reversed.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

MYLES E. FLINT
*Acting Assistant Attorney General*

EDWIN S. KNEEDLER
*Acting Deputy Solicitor General*

RONALD J. MANN
*Assistant to the Solicitor General*

EDWARD J. SHAWAKER
MARTIN W. MATZEN
*Attorneys*

JUNE 1993

## APPENDIX

1. The Act of May 27, 1902, ch. 888, § 1, 32 Stat. 263-264, provided, in relevant part:

> That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided,* That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre * * *; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians.

2. The Act of Mar. 3, 1905, ch. 1479, § 1, 33 Stat. 1069-1070, provides, in relevant part:

> That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the

manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the Act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry * * * *And provided further,* That all lands opened to settlement and entry under this Act remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the Act of Congress of May twenty-seventh, nineteen hundred and two, and the Acts amendatory thereof and supplemental thereto.

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the Act of Congress of May twenty-seventh, nineteen hundred and two[, ch. 888, § 1, 32 Stat. 263], such portion of the lands within



the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued.

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No. 92-6281

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1992**

ROBERT P. HAGEN,

PETITIONER,

vs.

STATE OF UTAH,

RESPONDENT.

# MOTION OF UTE INDIAN TRIBE TO INTERVENE AS A MATTER OF RIGHT

May 5, 1993

Robert S. Thompson, III
Counsel of Record
Sandra Hansen
Jeanne S. Whiteing
Tod J. Smith
WHITEING & THOMPSON
1136 Pearl Street, Suite 203
Boulder, Colorado 80302
(303) 444-2549

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1992

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No. 92-6281

ROBERT P. HAGEN,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

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**MOTION OF UTE INDIAN TRIBE TO INTERVENE AS A MATTER OF RIGHT**

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This appeal brings into question the correct boundaries of a portion of the Uintah and Ouray Reservation[1], the area over which the Ute Indian Tribe

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[1] The Uintah and Ouray Reservation is composed of two separate but contiguous tracts of land set aside for the use and occupancy of the Tribe. The Uintah Valley Reservation was established by Executive Order of (continued...)

(hereafter the "Tribe") exercises jurisdictional and governmental authority. The Tribe appeared before this Court, for the first time in this proceeding, as amicus curiae in opposition to the petition for writ of certiorari filed by Robert P. Hagen. This Court granted the writ of certiorari on April 19, 1993. Pursuant to Sup. Ct. R. 21 and Rule 24(a), Fed. R. Civ. P., the Tribe now moves this Court for leave to intervene in the appeal on the following grounds and for the following reasons.

**ARGUMENT**

This case will determine for all time the exterior boundaries of the Uintah and Ouray Reservation (hereafter the "Reservation"), which is located in northeastern Utah. Because those boundaries define the geographic parameters of the Tribe's governmental authority, the

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[1](...continued)
October 3, 1861, as confirmed by the Act of May 5, 1864, ch. 77, 12 Stat. 63, and the Uncompahgre Reservation was established by Executive Order of January 5, 1882. Only the boundaries of the Uintah Valley portion of the Uintah and Ouray Reservation are at issue in this appeal.



Tribe has an overriding interest in the subject matter of this proceeding. The Tribe cannot, however, fully participate in briefing the issues before the Court or present oral argument on an issue that will finally determine the scope of the its jurisdiction, unless the Court grants this motion to intervene.

Although this Court is not bound to adhere to or enforce the Federal Rules of Civil Procedure for cases brought before it, Rule 24(a), Fed. R. Civ. P., does provide a basis under which the Tribe may intervene in this appeal. In pertinent part, Rule 24(a), reads:

> anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Tribe clearly meets the requirements of Rule 24(a) and should, therefore, be granted intervention by this Court as a matter of right.

Moreover, granting the Tribe's motion at this stage of the proceeding would not be unprecedented. This Court has not hesitated to allow intervention when extraordinary factors dictate that intervention will serve the interests of justice. See generally United States v. Terminal Railroad Association, 236 U.S. 194, 199 (1915) (parties seeking modification of decree insofar as it operated prejudicially to their rights allowed to intervene, file briefs and present oral argument); National Labor Relations Board v. Acme Industrial Company, 384 U.S. 925 (1966), 385 U.S. 432 (1967) (union allowed to intervene as a party and file brief in support of its interests in labor controversy); Eastern-Central Motor Carriers Association v. United States, 321 U.S. 194, 198-99, n.5 (1944). The extraordinary circumstances presented by this case, wherein the Tribe is unable to fully participate in a proceeding in which its most fundamental interests are at issue, rise to a level that demands that intervention be allowed.



I.

**The Tribe is a Real Party in Interest and Possesses an Interest in the Subject of this Proceeding.**

Following ten years of litigation, the boundaries of the Reservation were confirmed by the United States Court of Appeals for the Tenth Circuit in 1985. See Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). All parties with an interest in the geographical scope of the Tribe's jurisdiction, including the State of Utah, the Respondent herein, participated in that litigation.[2]

The decision of the Tenth Circuit confirmed that, with two minor exceptions not relevant to this

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[2] The Tribe and the State of Utah were the primary parties in Ute Indian Tribe v. Utah, 521 F.Supp. 1072 (D. Utah 1981), aff'd in part, rev'd in part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied 479 U.S. 994 (1986). The United States participated in the case as an amicus curiae, supporting the Tribe's argument before the Tenth Circuit that the Uintah Valley Reservation had not been diminished. This Court has now been asked to weigh the decision of the Tenth Circuit in Ute Indian Tribe against a contrary ruling of the Utah Supreme Court. Absent the Court granting the Tribe's intervention request, however, it will have only one of the primary parties to the litigation before it, i.e., the State of Utah.

proceeding, the Uintah Valley portion of the Reservation had not been diminished by its opening to settlement by non-Indians under the Indian Appropriations Act of 1905, Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70. The ruling of the Tenth Circuit recognized that the Tribe's jurisdiction extends to some 4.4 million acres and that the actions of enrolled members of the Tribe, and those of members of other federally recognized Indian tribes, occurring on the Reservation are governed by tribal and federal, as opposed to state law.

Two years after the final ruling of the Tenth Circuit, the State of Utah initiated criminal prosecutions against two individuals, who belatedly asserted they were Indians. State v. Perank, No. 860243, Slip. Op. (Utah July 17, 1992); State v. Hagen, No. 910017, Slip. Op. (Utah July 17, 1992). The prosecutions alleged violations of state law occurring within the boundaries of the Reservation, as those boundaries had been confirmed by the Tenth Circuit. Neither the Tribe nor the United States were parties to the criminal proceedings. Despite the fact



that the Tenth Circuit had previously resolved the Reservation boundary issue, the Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, finding that the Reservation consists only of those lands held in trust by the United States for the Tribe or individual Indians. The ruling of the Utah Supreme Court has the effect of reducing the size of the Reservation, and correspondingly the area over which the Tribe may exercise jurisdiction, by approximately three million acres.

This appeal is being pursued by a defendant to one of the criminal actions begun by the State of Utah. That individual is not a member of the Tribe, may not be an Indian for criminal jurisdictional purposes[3] and has little,

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[3] Mr. Hagen has been found to possess 5/16ths Indian blood of the Little Shell Band of Chippewa Indians. The Little Shell Band of Chippewa Indians is not a federally recognized Indian tribe, see 51 Fed. Reg. 25,115 (1986), and its members, as a rule, are neither eligible for services from the Bureau of Indian Affairs nor recognized as being "Indian" for purposes of federal criminal statutes, see 25 U.S.C. §§ 450b, 479, 1452(b), 1603 and 1903(3) and (8).

if any, interest in advancing the governmental prerogatives of the Tribe. On the other hand, the Tribe, as the governmental entity with sovereign authority over its territory, is the entity most impacted by any judicial determination enhancing or diminishing the lands over which its authority extends. It is the Tribe, as opposed to the Petitioner, that has a fundamental interest in protecting the integrity of its territorial jurisdiction; in particular when that territorial jurisdiction has been judicially determined by the Tenth Circuit Court of Appeals, see Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985), cert. denied 479 U.S. 994 (1986), and when the Tribe has exercised its jurisdiction and authority without complaint or challenge by the State of Utah or its political subdivisions for the last seven years.

Like other governmental entities, there is no issue of greater importance to the Tribe than preservation of its territorial jurisdiction. Further, the Tribe, because it has judicially established the geographic scope of its territory, has a deep and abiding need to protect its prior judgment



on the continued existence of the Uintah Valley Reservation. Finally, the rights, interests and expectations of the Tribe, its members, members of other federally recognized Indian tribes and non-Indian Reservation residents have been established in reliance on the boundaries of the Uintah Valley Reservation remaining unchanged. The Tribe, and not Mr. Hagen, is responsible for representing those rights, interests and expectations and for ensuring that they are respected and affirmed.

Within the above-described framework, it is evident that the Tribe is the entity with the greatest interest in preserving the Reservation's boundaries as confirmed by the Tenth Circuit in Ute Indian Tribe. While Mr. Hagen is clearly an interested party, the issue before this Court, and Mr. Hagen's sole defense, directly implicates the Tribe and potentially invades its territorial jurisdiction.

Before this Court agreed to hear the petition for certiorari, the Tribe, its members and the United States were not given an opportunity to fully participate in the

state court proceedings of Utah or an opportunity to protect the prior judgment of the Tenth Circuit from collateral attack by the State of Utah. The tactics employed by the State and the lack of concern shown the Tribe by the Utah Supreme Court, especially when coupled with the conclusion that the real adversaries in this appeal should be the State of Utah and the Tribe, demand that the Tribe be allowed to participate in the appeal as a full party.

II.

**Disposition of the Proceeding may Impair or Impede the Tribe's Ability to Protect its Interest.**

Mr. Hagen seeks a determination that the Uintah Valley portion of the Reservation remains substantially intact, while the State of Utah asserts that the Uintah Valley area of the Reservation has been diminished or disestablished. Were the State of Utah to be successful, the Tribe's legally protected interest in the continued existence of the Reservation would be severely damaged and the rights of its over three thousand members



vitiated.

With regard to the governmental interests of the Tribe, serious consequences would befall the Tribe if this Court were to alter the boundaries of the Reservation. Such a judgment would reduce the Reservation by almost three million acres and deprive the Tribe and the United States of all civil and criminal jurisdiction over the non-trust lands of the Uintah Valley portion of the Reservation.[4] More importantly, because of the "checkerboard" nature of land ownership patterns, a judgment reducing the boundaries of the Reservation would result in a tract-book search to determine both civil and criminal jurisdiction. The Tribe would, therefore, lose the ability to comprehensively plan and regulate the environment and liquor transactions, to enforce hunting and fishing regulations, to regulate business development and to oversee the development of the Reservation as a

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[4] Depending on the severity of the offense, the United States and Indian tribes have exclusive jurisdiction to prosecute Indians for offenses committed in Indian country. See 18 U.S.C. § 1152.

whole. Tribal courts would also lose exclusive jurisdiction to adjudicate the welfare of Ute children who reside on the Reservation but not on trust lands. See 25 U.S.C. § 1911(a) (conferring exclusive jurisdiction on tribal courts to hear child custody proceedings involving Indian children who reside or are domiciled in "Indian country").

The consequences to tribal members, whom the Tribe as the sovereign is obligated to protect, of a diminishment of the Reservation are equally drastic. First, a diminishment of the Reservation would act to disenfranchise tribal members, who, pursuant to tribal law, must reside within the exterior boundaries of the Reservation to vote in tribal elections or to hold tribal elective office. See Article IV, § 1, Constitution of the Ute Indian Tribe of the Uintah and Ouray Reservation. Second, tribal members would, if the Reservation were to be adjudged diminished, be subjected to criminal prosecutions in state court for infractions occurring on non-trust lands of the Reservation. See DeCoteau v. District County Court, 420 U.S. 425 (1975). Third, tribal



members residing on non-trust lands of the Reservation would no longer be able to avail themselves of tribal court jurisdiction to resolve the full range of civil controversies, see Williams v. Lee, 358 U.S. 217 (1959), or domestic relations disputes, see Harris v. Young, 473 N.W.2d 141 (S.D. 1991). Fourth, tribal members not residing, working and locating their property on trust lands of the Reservation would be burdened by a plethora of state taxation statues that at present have no application to them. See Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973); Bryan v. Itasca County, 426 U.S. 373 (1976).[5]

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[5] As a practical matter, a diminishment of the Reservation would have the effect of creating two distinct classes of tribal members within the historic boundaries of the Reservation, those who live on trust lands and those who do not. Those members who reside on trust lands will continue to be subject to tribal and federal law, may make use of tribal courts and may participate in tribal government. However, those tribal members who now reside on non-trust lands of the Reservation, contrary to the expectations created by and reliance on Ute Indian Tribe, will be forced to surrender their voice in tribal

(continued...)

It is thus clear that it is the Tribe's governing powers and territory and the rights and privileges of its members that are the real issue in this proceeding. The Tribe must, therefore, be allowed to represent its and its members interests in order that it not be impaired or impeded in its efforts and authorities to govern.

III.

**The Tribe's Interests are Not Represented by the Parties.**

Although whether Mr. Hagen is free from prosecution by the State of Utah for his on-Reservation conduct turns on the continued existence of the Uintah Valley portion of the Reservation, the interests of Mr. Hagen and the Tribe are far from identical. Mr. Hagen desires to be free from incarceration, while the Tribe desires to retain its ability to govern and to protect its members from the encroachment of state law. These interests, albeit interrelated, are not co-extensive.

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[5](...continued)
government and to become persons subject to the jurisdiction of the State of Utah.



Because the Tribe had prevailed in Ute Indian Tribe, it opposed review of the boundaries of the Reservation by this Court, preferring to challenge the State's ability to dispute the boundaries of the Reservation in Federal District Court.[6] It was for this reason, among others, that the Tribe opposed this Court granting Mr. Hagen's petition for a writ of certiorari. In addition, the Ute Tribal Court, on at least one occasion, has ruled that Mr. Hagen is not an Indian for purposes of its criminal code, and that he is subject to prosecution by the State of Utah, regardless of the location of the Reservation's boundaries.[7] A single individual, like Mr.

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[6] Following issuance of the Utah Supreme Court orders in State v. Perank and State v. Hagen, the Tribe filed a renewed motion for injunctive relief in the Federal District Court for Utah. In its motion, the Tribe asked the district court to enjoin the Utah Supreme Court from issuing the remittitur, and thereby entering as final, its decision in State v. Perank, on the ground that the State of Utah was collaterally estopped from challenging the boundaries of the Reservation by the ruling in Ute Indian Tribe.

[7] The Tribe and the United States, as amicus curiae, are the only entities before the Court that have raised this
(continued...)

Hagen, who is not a member of the Tribe and who may not be an Indian for criminal jurisdiction purposes cannot represent the sovereign governmental interests of the Tribe or the interests of its members.[8]

It is the Tribe that can present arguments concerning the pertinent statutes to be reviewed by the Court, that can adequately set the historical framework surrounding the opening of the Reservation and that can

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[7](...continued)
issue. Mr. Hagen will not because if found not to be an Indian, his jurisdictional arguments are defeated. The State of Utah will not question Mr. Hagen's Indian status because the boundaries of the Reservation would no longer be at issue, and its efforts to gain this Court's review of Ute Indian Tribe would be for naught.

[8] The Tribe's concerns regarding the full representation of its interests might be lessened if the United States were a party to this proceeding. The United States, before the Tenth Circuit in Ute Indian Tribe and in its amicus brief to this Court in response to Mr. Hagen's petition, argued that the Uintah Valley Reservation had not been diminished by its opening to settlement. Due, however, to the posture of the appeal and the strategy used by the State of Utah in its prosecutions, the United States, like the Tribe, is not a party to this appeal. The Tribe thus has no alternative but to seek an opportunity to protect its substantial interests through participation in this proceeding as a full party.



focus the Court's attention on the governmental issues underlying this appeal, not Mr. Hagen. It is also the Tribe that can argue the issue of Mr. Hagen's Indian status, a question Mr. Hagen has consistently attempted to avoid. Finally, it is the Tribe alone that will and must represent its sovereign governmental interests and the concerns, needs and rights of its members.

## CONCLUSION

The Court should grant the Tribe's motion to intervene because: it is a real party in interest to the controversy; it and its members are those most likely to be impacted by this Court's decision; the interests of the Tribe and of its members are not now represented in the proceeding; and the rights of the Tribe and its members may be impaired or impeded by this Court's decision.

WHEREFORE, the Ute Indian Tribe respectfully requests this Court to enter an order granting the Tribe's motion to intervene and to participate in the briefing of the appeal as a full party aligned with the Petitioner.

Supreme Court, U.S.
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No. 92-6281

In The

# Supreme Court of the United States

October Term, 1992

ROBERT P. HAGEN,

*Petitioner,*

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STATE OF UTAH,

*Respondent.*

**On Writ Of Certiorari**
**To The Utah Supreme Court**

## BRIEF OF THE NAVAJO NATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

HERB YAZZIE
Attorney General
Navajo Nation Department
of Justice
Post Office Drawer 2010
Window Rock, Navajo
Nation (AZ) 86515
(602) 871-6343

PAUL E. FRYE*
NORDHAUS, HALTOM, TAYLOR,
TARADASH & FRYE
Suite 1050
500 Marquette Avenue NW
Albuquerque, NM 87102
(505) 243-4275

*Attorneys for Amicus Curiae*

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## BRIEF OF THE NAVAJO NATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

### INTEREST OF THE *AMICUS CURIAE*

This case concerns whether use of the phrase "restore to the public domain" in federal legislation opening an Indian reservation provides substantial and compelling evidence of a congressional intent to disestablish that reservation. The Tenth Circuit held that it does not and that the Uintah reservation was not disestablished. *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (*en banc*), *cert. denied*, 479 U.S. 994 (1986) ("*Ute*"). The Utah Supreme Court here held to the contrary and found that the Uintah reservation was disestablished, relying on *State v. Perank*, 191 Utah Adv. Rep. 5 (1992).

The Navajo Nation is vitally interested in the outcome of this case. In 1908 and 1911, unallotted land in a 1.9 million acre part of the Navajo reservation in New Mexico was "restored to the public domain" under a 1908 act of Congress.[1] The Navajo Nation initially prevailed in litigation concerning the reservation status of this area, but a panel of the Tenth Circuit reversed. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir.), *cert. denied*, 498 U.S. 1012 (1990) ("*Yazzie*"). The opinion in *Yazzie* acknowledged that neither the statute nor its sparse legislative history adverted to reservation boundaries or jurisdictional matters. However, *Yazzie* summarily rejected the factual findings of the district court, constructed an "executive intent" which it "inferred" to Congress, and concluded that use of the operative phrase "restore to the public domain" extinguishes reservation boundaries – dismissing the contrary holding of the *en banc* court in *Ute* as "unexamined and unsupported." *Yazzie*, 909 F.2d at 1393-94 & n.7, 1395-96 & n.9, 1400, 1404 n.23 and 1419. Rehearing *en banc* was denied by an evenly divided court.

Last week, on June 11, 1993, the district court held in favor of the company on the remaining issues on remand from *Yazzie*. The Navajo Nation seeks to preserve its ability to urge successfully that the Tenth Circuit's ruling on disestablishment in *Yazzie* should be reconsidered under established law of the case principles. *See* 1B

[1] Act of May 29, 1908, ch. 216 § 25, 35 Stat. 444, 457. *See* Executive Orders Nos. 1000 (Dec. 30, 1908) and 1284 (Jan. 28, 1911), *reprinted in* III Charles J. Kappler, *Indian Affairs: Laws and Treaties* 685-86 (1913).



*Moore's Federal Practice* ¶ 0.404[4.-6] (1993). New and undisputed evidence from the 1990 census reveals that 10,772 of the 11,334 of the residents – fully 95% – in the disputed area are Indians;[2] indeed, most of the non-Indians living there work for the BIA or Indian Health Service. Less than 15% of the land is owned in fee by non-Indians, and the Navajo Nation and United States provide almost all of the services in the area.[3] Both Congress and the Executive branch consistently regarded the entire area as part of the Navajo reservation.[4] The court in *Yazzie* justified its wide-ranging appellate fact-finding on grounds which this Court found improper in *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992), *reversing Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990). And *Yazzie*'s imputation of congressional intent upon selected documents

[2] *Cf. Duro v. Reina*, 495 U.S. 676, 695 (1990) (non-Indians outnumber Indians on most reservations).

[3] *See Pittsburg & Midway Coal Mining Co. v. Saunders*, No. CIV 86-1442 M (D.N.M. Aug. 22, 1988), reproduced at 909 F.2d 1387, App. C at 1432, 1436-37 (10th Cir.) ("*Saunders*") ("The contribution of the State of New Mexico is small. . . . The prominent law enforcement agency in the . . . area is the Navajo Nation Police. The vast majority of civil and criminal disputes are litigated in Navajo Tribal Court. The Tribe proved up many more indications, too numerous to detail here, of the dominance of the Navajo Nation over life in the . . . area."), *rev'd on other grounds*, 909 F.2d 1387 (10th Cir.), *cert. denied*, 498 U.S. 1012 (1990).

[4] Congress termed the area the Pueblo Bonito "reservation" or "subdivision of the Navajo Reservation" in nine appropriations acts from 1919 to 1927, and maps and annual reports of the Commissioner of Indian Affairs from 1908-1927 generally depicted and described the area as an "opened reservation." *Saunders, supra* n.3, 909 F.2d at 1436.

never seen by any member of Congress cannot survive *Negonsott v. Samuels*, 113 S. Ct. 1119, 1124 n.4 (1993).

Thus, only if this Court determines that use of the operative phrase "restore to the public domain" automatically provides substantial and compelling evidence of a congressional intent to disestablish can the court's decision in *Yazzie* withstand scrutiny. *See Solem v. Bartlett*, 465 U.S. 463, 472 (1984). The Navajo Nation's research reveals that use of the phrase "restore to the public domain" has no overriding significance in the diminishment context, and files this brief to preserve its interest in maintaining law and order in the opened part of its reservation. *See id.* at 471 n.12.

## SUMMARY OF THE ARGUMENT

In *Ute*, the Court of Appeals, *en banc*, held that the Uintah Reservation was not diminished by legislation opening it to non-Indian entry. Consistent with *Solem v. Bartlett*, 465 U.S. 463, 475 n.17 (1984), *Ute* held that it was equally plausible that use of the phrase "restore to the public domain" simply meant that Indian lands would be available for settlement but that reservation boundaries would remain unchanged, and the *Ute* court was unable to find elsewhere the "substantial and compelling" indications of a congressional intent to diminish required by *Solem v. Bartlett*, 465 U.S. at 470-72. In holding to the contrary with respect to the same Indian reservation, the



Utah Supreme Court relied solely on *State v. Perank*, 191 Utah Adv. Rep. 5 (1992), which concluded first that use of the phrase "restore to the public domain" provides "persuasive" evidence of a congressional intent to diminish and which devoted the rest of the opinion to concluding that the 1905 opening legislation which did not use the phrase merely amended a 1902 act which did.

The first conclusion in *Perank* is erroneous, and the second is therefore immaterial. The phrase "public domain" has never had an official meaning, and it typically describes land subject to disposal under general laws. This Court has consistently rejected the notion that the term "public domain" or "public lands" has a precise meaning without reference to a definitional section or its context in a statute.

Indeed, *Perank*'s only support for the position that use of the phrase "restore to the public domain" signals disestablishment is a later panel decision of the Tenth Circuit, *Yazzie*, which is based on inconclusive dictionary references, an internally contradictory report issued in 1880, inferences and deductions bordering on speculation, and the unique view that it was empowered to reject as "unexamined and unsupported" the considered legal conclusions of a prior *en banc* opinion of the same court of appeals. *Yazzie*, 909 F.2d at 1400. The authority cited in *Yazzie* is not only insubstantial; if taken at face value, much of it supports the view that the phrase "restore to the public domain" was thought historically to affect only land titles and not governmental jurisdiction.

Although *Yazzie* gives superficial sanction for Utah's opportunistic misuse of a petty criminal prosecution solely to relitigate *Ute*, this case shows the pitfalls of such manipulation. Utah stated to the court of appeals in *Ute* that the district court committed no reversible error in holding that the area of the Uintah Reservation at issue here was not diminished, and even the counties and cities of Utah which *did* appeal represented to the *Ute* court that its decision would settle "once and for all" the jurisdiction of the area. Allowing Utah to prevail here on the one-sided record it developed below would encourage state attorneys throughout the country to create conflicts with settled diminishment decisions of the lower federal courts, requiring resolution here.

## ARGUMENT

### I. THE DECISION BELOW RESTS ULTIMATELY ON *YAZZIE*, A PANEL DECISION WHICH EXPLICITLY REJECTED THE CONSIDERED LEGAL CONCLUSIONS OF A PRIOR *EN BANC* DECISION OF THE SAME COURT OF APPEALS.

In 1985, the Court of Appeals for the Tenth Circuit, sitting *en banc*, held that Congress did not disestablish the Uintah Reservation. *Ute*, 773 F.2d at 1090. *Ute* reasoned that because "it is equally plausible that the phrase means that Indian lands would be available for settlement but that the boundaries remain unchanged . . . [t]he . . . expression 'return to the public domain' does not reliably establish the clear and unequivocal evidence of Congress' intent to change boundaries" required under



*Solem v. Bartlett*, 465 U.S. 463 (1984). *Ute*, 773 F.2d at 1092. As the petition for certiorari in *Ute* and related submissions filed in this Court show, all persons with an interest in the Uintah reservation – the United States, the tribe, the State of Utah, the counties and cities, and even a landowner in the opened Navajo reservation in New Mexico – participated in that case, and the significance of the phrase "restore to the public domain" was *the* central issue in that case. With the benefit of the arguments of all parties, the *en banc* Court of Appeals held in *Ute* that the phrase was not sufficient to show a congressional intent to disestablish.

Later, in *Yazzie*, the party urging disestablishment of the Navajo reservation in New Mexico asserted to the Court of Appeals that use of the phrase " 'restore to the public domain' . . . was then, and is now, a legal term of art . . . [which] terminated all reservation status for the area."[5] Because no panel of the Court of Appeals has the authority to reject the considered legal conclusions of a prior *en banc* decision of that same Court of Appeals,[6] the Navajo Nation devoted only one-half page of its answer brief to that issue, relying on *Ute* and *Solem v. Bartlett*, 465 U.S. at 475 n.17. However, the *Yazzie* panel resurrected the dissent in *Ute* and, as the Utah Supreme Court observed, "rejected" the conclusions of the *Ute* majority with respect to the effect of restoration language. *State v. Perank*, 191 Utah Adv. Rep. 5, 9 (1992).

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[5] Brief of the Pittsburg & Midway Coal Mining Co., Appellant at 6, No. 88-2413 (10th Cir. 1988).

[6] *See Fed. R. App. P.* 35.

In proceedings below, the Utah Court of Appeals was aware that the Utah Supreme Court in *Perank* was being asked to ignore *Ute*. Unimpressed, the Utah Court of Appeals reversed Hagen's conviction, "[s]eeing no possibility of an effective decision in *Perank* contrary to the result in *Ute Indian Tribe*." *State v. Hagen*, 802 P.2d 745, 747 (Utah App. 1990), *rev'd*, 191 Utah Adv. Rep. 26 (1992).

In *Perank*, however, the Utah Supreme Court observed that *Yazzie* "clearly departs from the court's prior conclusion in *Ute Indian Tribe* as to the effect of restoration language. Indeed, *Yazzie* held that use of operative restoration language diminishes a reservation as to the land restored to the public domain." *State v. Perank*, 191 Utah Adv. Rep. 5, 10 (1992). Almost exclusively in reliance on *Yazzie*, the Utah Supreme Court in *Perank* concluded that operative restoration language "is persuasive evidence of congressional intent to diminish." *Id.* The rest of the *Perank* opinion is largely devoted to showing that the 1905 act of Congress which actually opened the Uintah reservation but which did not use the phrase "restore to the public domain" was merely amendatory of a 1902 act which did. *Id.* at 10-18. Notably, *Perank* was litigated at all stages without any effective participation of the United States or the Ute Indian Tribe. *Id.* at 22 (Zimmerman, J., dissenting) (referring to the "virtually unchallenged" arguments of Utah on the boundary question).

Based solely on *Perank*, the Utah Supreme Court reversed the Utah Court of Appeals in *Hagen* and held that the crime committed by petitioner Hagen did not occur in Indian country. *State v. Hagen*, 191 Utah Adv. Rep. 26 (1992). Thus, having failed to convince this Court



to reverse the *en banc* decision in *Ute* where the Tenth Circuit had the benefit of a complete factual record and exhaustive briefs of all interested parties, Utah now asks the Court to bless its position on a one-sided record put together by it alone on the authority of *Yazzie* – the sole example of a panel explicitly rejecting the considered legal conclusions of an *en banc* opinion of the same federal Court of Appeals.

## II. *YAZZIE*'S CONCLUSION THAT USE OF THE PHRASE "RESTORE TO THE PUBLIC DOMAIN" PROVIDES PERSUASIVE EVIDENCE OF A CONGRESSIONAL INTENT TO DIMINISH IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

In *Solem v. Bartlett*, this Court observed that "even without diminishment, unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." 465 U.S. 463, 475 n.17 (1984). Similarly, in *Rosebud Sioux Tribe v. Kneip*, this Court pointed out that "[t]he question of whether lands become 'public lands' . . . is therefore logically separate from a question of disestablishment." 430 U.S. 584, 601 n.24 (1977). *Solem* and *Rosebud* are consistent with the view of the Department of the Interior, which determined in an opinion concerning the Indian reservation at issue here that the "surplus lands of the Uintah and White River Utes are properly regarded as Indian lands" and that the use of the operative phrase "restore to the public domain" is "only a method of indicating that the lands are to be subject to disposition under the public land

laws." *Whether Surplus Lands in Uintah and Ouray Reservation are Indian Lands*, II Op. Sol. 1205 (1943). *Accord Restoration to Tribal Ownership of Ceded Colorado Ute Indian Lands*, 56 I.D. 330, 337-39 (1938) (declaration in 1880 statute that certain lands "shall be held and deemed to be public lands of the United States" is not inconsistent with their status as "surplus lands of an Indian reservation heretofore opened" under 25 U.S.C. § 463).

Many other decisions of this Court refute the notion that dispositive significance should be given to the fact that Indian lands were restored to the "public lands" or to the "public domain," phrases assumed to be synonymous in *Yazzie*. 909 F.2d at 1402. The meaning generally ascribed to "public lands" is "well settled." *Union Pac. R.R. v. Harris*, 215 U.S. 386, 388 (1910). The phrase simply describes lands " 'subject to sale or other disposal under general laws.' " *Id.*, quoting *Newhall v. Sanger*, 92 U.S. 761, 763 (1875). *See Utah Div. of State Lands v. United States*, 482 U.S. 193, 206 (1987). However, even this typical usage is not inflexible. *Kindred v. Union Pac. R.R.*, 225 U.S. 582 (1912), held that a statute granting a right of way through "public lands" contemplated a right of way grant through Indian lands. The Court observed that although "public lands" ordinarily means "such lands as are subject to sale or other disposal under general laws . . . it sometimes is used in a larger and different sense." *Kindred*, 225 U.S. at 596. Thus, in *Amoco Prod. Co. v. Gambell*, the Court "reject[ed] the assertion that the phrase 'public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute." 480 U.S. 531, 548-49 n.15 (1987).



Indeed, in 1864 Congress *equated* "Indian or other reservations" with "public lands." 25 U.S.C. § 176. A century later, Congress demonstrated the same understanding, expressly excepting Indian reservations from the "public lands" to be studied by the Public Land Law Review Commission. Act of Sept. 19, 1964, § 10, 78 Stat. 982, 985 (formerly codified as 42 U.S.C. § 1400).

*Yazzie* overlooked these authorities in its search for the one true meaning of the phrase "restore to the public domain." After distinguishing the principal diminishment cases, including *Ute* whose conclusions it found "unexamined and unsupported," 909 F.2d at 1397-1400, *Yazzie* reviewed dictionary references and examined dissimilar statutes from other cases. 909 F.2d at 1401. *Cf. Hynes v. Grimes Packing Co.*, 337 U.S. 86, 115-16 (1949) ("one may not fully comprehend the statute's scope by extracting from it a single phrase, such as 'public lands' and getting the phrase's meaning from the dictionary or even from dissimilar statutes"). *Yazzie* determined that the "dictionary definitions . . . do not clearly resolve the potential ambiguity with respect to title and jurisdiction"; indeed, the definition of "public domain" quoted in *Yazzie* supports the view that it concerned only *ownership* of land, not jurisdiction over it. 909 F.2d at 1401.

*Yazzie* then made "deductions . . . largely based on inferential evidence." 909 F.2d at 1402. In an extended passage relied on *verbatim* in *Perank*, *Yazzie* examined dicta from several cases involving dissimilar statutes, reversed the proper presumption, and, ignoring *Ute*, stated that it "found no case where operative restoration language was not accepted as language of termination."

909 F.2d at 1404.[7] Be that as it may, this Court has made clear that each opening statute must be reviewed separately, because each is the "product of a unique set of tribal negotiation and legislative compromise." *Solem v. Bartlett*, 465 U.S. 463, 467 (1984).

*Yazzie*'s inquiry into the general interpretation by the executive branch of restoration language "begin[s] with the Public Land Commission's history of the public domain, commissioned by Congress and issued in 1880." *Yazzie*, 909 F.2d at 1404. *Yazzie* observed that this document states that one procedure for "abolishing" an Indian reservation includes issuance of an order "restoring the

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[7] *Yazzie* should have stated that it could find no case where operative restoration language was held sufficient to extinguish reservation boundaries. *See Solem v. Bartlett*, 465 U.S. 463, 472 (1984) ("There are, of course, limits to how far we will go to decipher Congress' intention in any particular surplus land Act. When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place. . . . "); *Mattz v. Arnett*, 412 U.S. 481, 496-99, 504 & n.22 (1973); *United States v. Wounded Knee*, 596 F.2d 790, 794 (8th Cir.) ("[I]t would seem to be a usurpation of legislative authority to say that Congress *must* have meant thus and so; therefore we will simply plug the missing words into the Act."), *cert. denied*, 442 U.S. 921 (1979); *United States v. Grey Bear*, 828 F.2d 1286, 1290 (8th Cir. 1987) (although opening act contained language precisely suited to diminishment, reservation boundaries were unaffected because of lack of a commitment to pay for the opened land), *panel reh'g denied*, 836 F.2d 1086 (8th Cir. 1987), *vacated in part on other grounds on grant of reh'g en banc*, 836 F.2d 1088 (8th Cir. 1987), *on reh'g*, 863 F.2d 572 (8th Cir. 1988). *Cf. Seymour v. Superintendent*, 368 U.S. 351, 354 (1962) (Reservation "*vacated* and restored to the public domain" by act of Congress was diminished) (emphasis added).



lands to the public domain." U.S. Pub. Land Comm'n, *The Public Domain* (1880) at 243-44.

However, *Yazzie* overlooked the fact that the 1880 report itself refutes the contention that the "public domain" and Indian reservations were considered to be mutually exclusive. The report includes Indian reservations in one table summarizing various categories of land in the "public domain." *Id.* at 25-26. After equating the phrases "public lands" and "public domain," the report discusses surveys of Indian reservations in the chapter entitled "Surveys of the Public Lands." *Id.* at 10, 179. The "grand total" of land in Indian reservations was reported to be 154,436,362 acres. *Id.* at 247. Correspondingly, the "area of *public lands* in Indian reservations" was reported in another table to be 154,436,362 acres. *Id.* at 26 (emphasis added). The report concludes that land remaining in the "public domain" totals "830,284,276.43 acres, *inclusive* of Indian and military reservations." *Id.* at 531 (emphasis added).

Even if the one passage of the report emphasized in *Yazzie* were viewed in isolation, it would still be unreliable. *See* Paul W. Gates, *History of Public Land Law Development* 430-34 (1968). In 1882, William S. Holman, a recognized federal land expert, stated that the report was "not a work of permanent interest suitable for libraries, but only of temporary interest." 18 Cong. Rec. 6954 (1882). The report "provides little or no information about the way the land system was actually functioning." *History of Public Land Law Development* at 431. "One writer has shown that Donaldson [the author of the 1880 report] committed six important errors in one sentence concerning the grants of the saline lands to the states when they were admitted." *Id.* The author's prejudices led him to

"distort the facts" and give "obviously misleading accounts." *Id.* at 433-34. In contrast to the uncritical use of an isolated sentence in the 1880 report in *Yazzie*, a noted authority has warned that it should "be used with caution; it contains many inaccuracies." E. Louise Peffer, *The Closing of the Public Domain* 12 n.6 (1951). "Nothing of any value came of the recommendations" contained in the report. *Id.* at 14. Indeed, accepting one of the recommendations related to railroad land proved to be "among the most regrettable steps taken by Congress in land matters." *History of Public Land Law Development* at 429.

In imputing to Congress in the twentieth century a reliance on an obscure passage from an internally contradictory and discredited report issued in 1880, *Yazzie* missed the central fact that the phrase

> "public domain" . . . has no official definition. In its most general application, a public domain is meant to include all land owned by a government – any government, anywhere.

*The Closing of the Public Domain* at 5 (footnotes omitted).[8] The phrase had no official definition in 1880[9] and it has

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[8] *Accord Utah Div. of State Lands v. United States*, 482 U.S. 193, 212 n.4 (1987) (White, J., dissenting).

[9] Later reports of the Public Land Commission similarly include Indian reservations as part of the "public domain." *See Report of the Public Lands Commission*, S. Doc. No. 189, 58th Cong. 3d Sess. 306, 361 (1905). Official compilations of public land statutes equate Indian reservations and public lands. A 1916 compilation of "public land" statutes includes 38 pages of statutes relating to Indian reservations. *Public Land Statutes of the United States* 119-156 (U.S.G.P.O. 1916). Similarly, the 1931 compilation of "public land" statutes includes 73 pages of statutes relating to Indian reservations. *Public Land Statutes of the United States* 225-297 (U.S.G.P.O. 1931).



none now. *See Solem v. Bartlett*, 465 U.S. 463, 475 & n.17 (1984); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 548-49 n.15 (1987).

## III. AFFIRMANCE WOULD ENCOURAGE FURTHER ABUSE OF THE JUDICIAL PROCESS BY STATE ATTORNEYS SEEKING TO CIRCUMVENT ESTABLISHED PRECEDENT SOLELY FOR THE PURPOSE OF FORCING REVIEW BY THIS COURT.

The *en banc* decision in *Ute* followed an exhaustive examination of the facts and law in the district court and vigorous briefing and argument before the entire Court of Appeals by all interested parties. The counties and cities said there that the outcome of *Ute* would "define, *once and for all*, the governmental authority of the various parties in the area involved (absent further congressional involvement)."[10] As the Utah Court of Appeals noted, the federal courts in *Ute* "construe[d] federal statutes, federal regulations, and federal Indian policy,"[11] and, as Justice

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[10] Reply Brief of Appellee/Cross-Appellant Counties and Cities at 1, Nos. 81-1827, 81-1901 (10th Cir. 1982) (emphasis added). Indeed, the State of Utah did not even appeal the district court's ruling that the Uintah reservation was not disestablished in the area over which it now claims authority, stating that "it was difficult for any party to demonstrate reversible error." Brief of Appellee State of Utah on Rehearing En Banc at 1-2, Nos. 81-1827, 81-1901 (10th Cir. 1984).

[11] *State v. Hagen*, 802 P.2d 745, 747 (Utah App. 1990), *rev'd*, 191 Utah Adv. Rep. 26 (1992).

Zimmerman wrote in dissent, federal Indian law is the product of the "preeminent authority and a unique trust responsibility" of the United States. *State v. Perank*, 191 Utah Adv. Rep. 5, 22 (1992) (Zimmerman, J., dissenting). Indeed, the trust responsibility "arose largely from the federal role as a guarantor of Indian rights against state encroachment." *Washington v. United States Envtl. Protection Agency*, 752 F.2d 1465, 1470 (9th Cir. 1985), citing *United States v. Kagama*, 118 U.S. 375, 383-84 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). *See generally Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S. Ct. 1985, 1991 (1993) (noting the " 'deeply rooted' policy in our Nation's history of 'leaving Indians free from state jurisdiction and control' "), citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) (internal quotation marks omitted).

Thus, although the suggestion of the Utah Court of Appeals that the Supremacy Clause bars state court disagreement with *Ute* may be overly cautious,[12] this case presents perhaps the least attractive circumstances for such second-guessing. In contrast with *Perank* and *Hagen*, *Ute* was decided after development of a complete factual record and with the vigorous participation of all interested parties. In *Ute*, federal law was interpreted by a federal court of appeals sitting *en banc*. The issue of diminishment is particularly sensitive with state governments, which have typically coveted authority over

[12] *State v. Hagen*, 802 P.2d at 747. *Cf. Lockhart v. Fretwell*, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring) (If state court follows lower federal court's interpretation of federal law, "it does so only because it chooses to and not because it must.").



Indian lands. Allowing Utah to make "opportunistic misuse of [a] petty criminal prosecution to readjudicate a settled issue," will encourage energetic prosecutors in all areas of the country to pursue a similar strategy for the "sole purpose of creating a conflict with the federal courts to force Supreme Court review."[13] *State v. Perank*, 191 Utah Adv. Rep. 5, 22-23 (1992) (Zimmerman, J., dissenting).

Moreover, the conceded lack of participation by the United States and the Utes in *Hagen* and *Perank* is further exacerbated by the unprecedented procedures in *Yazzie*, upon which the decision below ultimately rests. Contrary to consistent Tenth Circuit precedent,[14] the *Yazzie* panel pointedly rejected the governing legal standard established by the *en banc* decision in *Ute*, effectively preempting a full presentation on this issue by the tribal party in *Yazzie*. The decision making in the case before the Court has been grossly distorted by the absence of effective articulation and consideration of tribal and federal interests.

[13] A partial list of the diminishment cases decided by the lower courts appears in *Felix S. Cohen's Handbook of Federal Indian Law* 44 n.153 (R. Strickland ed. 1982).

[14] *See, e.g., United States v. Taylor*, 828 F.2d 630, 633 (10th Cir. 1987); *United States v. Berryhill*, 880 F.2d 275, 277 (10th Cir. 1989), *cert. denied*, 493 U.S. 1049 (1990); *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470, 1481 (10th Cir. 1990); *United States v. Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990).

## CONCLUSION

Utah's attempt to relitigate *Ute* depends on its contention that use of the phrase "restore to the public domain" is persuasive evidence of a congressional intent to diminish. Upon close examination, the authority on which Utah's position ultimately rests, *Yazzie*, is insubstantial, relying as it does on inconclusive dictionary references, deductions and inferences bordering on speculation, an internally contradictory and discredited report issued in 1880, and – most fundamentally – an abandonment of the principles of statutory construction set forth so clearly by this Court in *Solem v. Bartlett*.

Respectfully submitted,

HERB YAZZIE
Attorney General
Navajo Nation Department
of Justice
Post Office Drawer 2010
Window Rock, Navajo
Nation (AZ) 86515
(602) 871-6343

PAUL E. FRYE
NORDHAUS, HALTOM, TAYLOR,
TARADASH & FRYE
Suite 1050
500 Marquette Avenue NW
Albuquerque, NM 87102
(505) 243-4275

*Attorneys for Amicus Curiae*
*Navajo Nation*

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1992**

ROBERT P. HAGEN,
PETITIONER,

vs.

STATE OF UTAH,
RESPONDENT.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF UTAH

# BRIEF OF *AMICUS CURIAE* UTE INDIAN TRIBE

Robert S. Thompson, III
*Counsel of Record*
Sandra Hansen
Jeanne S. Whiteing
WHITEING & THOMPSON
1136 Pearl Street, Suite 203
Boulder, Colorado 80302
(303) 444-2549

*Counsel for Amicus Curiae*
*Ute Indian Tribe*

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## INTEREST OF AMICUS CURIAE

The interest of the *amicus curiae* Ute Indian Tribe is set forth in the Brief of Amicus Curiae Ute Indian Tribe in Opposition to the Petition for Writ of Certiorari at ii, Hagen v. Utah, No. 92-6281, cert. granted, __ U.S. __, 113 S.Ct. 1840 (1993). The written consent of the parties to the Tribe's participation in these proceeding as an *amicus* are reproduced id., App. A.

## STATEMENT OF THE CASE

In 1861, President Lincoln set aside 2,046,080 acres of land in northeastern Utah as the Uintah Valley Reservation.[1] Eventually, the Uintah Valley Reservation, along with the adjacent Uncompahgre Reservation,[2] became the homeland of three then-autonomous bands of Ute Indians.[3]

At the turn of the century, Congress enacted a series of statutes that sought to open the Uintah Valley Reservation to settlement by non-Indians. In order to resolve this action, the Court must determine whether, by the Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-64, as amended by the Acts of March 3, 1903, ch. 994, 32 Stat. 982, 997-98; April 21, 1904, ch. 1402, 33 Stat. 189, 207-08; and March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70, Congress intended to disestablish

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[1] See Executive Order of October 3, 1861, as confirmed by the Act of May 5, 1864, ch. 77, 12 Stat. 63.

[2] The Uncompahgre Reservation was established by Executive Order of January 5, 1882. Today, the Reservations have been combined into the single "Uintah and Ouray Indian Reservation." However, only the boundaries of the Uintah Valley Reservation are at issue in this action. See Brief of Respondent in Support of Petition for Writ of Certiorari at 3, n.1, Hagen v. Utah, No. 92-6281, cert. granted, _ U.S. _, 113 S.Ct. 1840 (1993) [hereafter "State's Cert. Br. at __"].

[3] The formerly autonomous bands united to comprise the Ute Indian Tribe under § 16 of the Indian Reorganization Act, ch. 576, 48 Stat. 984, 987 (June 18, 1934). See Preamble, Constitution of the Ute Indian Tribe (approved Jan. 19, 1937).

more than half of the Reservation despite the Utes' steadfast and unanimous objections.

In 1975, the Ute Indian Tribe filed a declaratory judgment action in the Federal District Court for the District of Utah, seeking a determination on the very issue which is now before this Court. See Ute Indian Tribe v. Utah, 521 F.Supp 1073 (D. Utah 1981), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).[4] The United States, the Tribe, the State of Utah and the affected counties fully participated in the federal court proceedings. After 10 years of litigation, the federal courts concluded that the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70, was the operative statute in opening the Uintah Valley Reservation to settlement, and that the 1905 Act did not disestablish the Reservation. See id.

The federal courts arrived at their decision after analyzing the relevant language of the Acts, the legislative history and surrounding circumstances, and the subsequent treatment accorded the Reservation by

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[4] Utah intimates that the reservation-boundary issue was first decided by the Utah Supreme Court in Brough v. Appawora, 553 P.2d 934 (Utah 1976), vacated, 431 U.S. 901 (1977). See State's Cert. Br. at 2-3 (characterizing the reservation-boundary issue as having "surfaced" in federal court after the Utah Supreme Court had decided the issue). In fact, the Ute Indian Tribe litigation was initiated more than a year before the Utah Supreme Court decided Brough. Moreover, in deciding Brough, the Utah Supreme Court failed to apply this Court's clear analytical structure for determining when a reservation has been disestablished. See id. Instead, the Utah Supreme Court summarily concluded not only that the Uintah and Ouray Reservation, but also the *entire Ute Indian Tribe*, "no longer exist". Id. at 935.



Congress and the executive branch. See 521 F.Supp. at 1111-50; 773 F.2d at 1088-89.[5]

While the State's petition for a writ of *certiorari* to the Tenth Circuit in the Ute Indian Tribe litigation was pending in this Court, the State chose to relitigate the

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[5] The State of Utah chose not to appeal the federal district court's decision because:

> [t]he ultimate determination of the [district] court [] that . . . the Uintah [Valley] Reservation was not disestablished . . . was carefully reached after a deliberate and painstaking evaluation of thousands of pages of documents, after weighing the testimony of witnesses, after examining maps and photographs, and then by placing this giant mosaic of law and fact into historical and practical perspective. In so doing, *the [district] court was sensitive and obedient to all relevant guidance by the decisions of the U. S. Supreme Court* . . ..

Brief of Appellee State of Utah at 2-3, Ute Indian Tribe v. Utah, 773 F.2d 1087 (Nos. 81-1827 & 81-1901), cert. denied, 479 U.S. 994 (1986); Rec. Vol. XIX, No. 2 [hereafter "State's 10th Cir. Br. at __"] (emphasis added). Indeed, Utah opined that "it is virtually impossible for any party to present a persuasive argument to show that the district court committed reversible error." Id. at 2.

Moreover, Utah did not seek Tenth Circuit reconsideration of that part of the court's en banc decision finding that the Uintah Valley Reservation had not been disestablished, although the State did ask the Tenth Circuit to reconsider its decision with respect to two parcels not at issue in these proceedings. See Petition of Appellee State of Utah for Reconsideration, Ute Indian Tribe v. Utah, 773 F.2d 1087 (Nos. 81-1827 & 81-1901), cert. denied, 479 U.S. 994 (1986); Rec. Vol. XIX, No. 22.

reservation-boundary issue in state court.[6] To ensure that the State courts would reach the reservation-boundary issue, the State chose to relitigate that settled issue of federal law in three separate cases, each involving a different "category" of person alleging to be Indian. See State v. Perank, 191 Utah Adv. R. 5 (July 17, 1992) (State's Cert. Br. at 4a); State v. Hagen, 191 Utah Adv. R. 26 (1992) (State's Cert. Br. at 1a); State v. Coando, 191 Utah Adv. R. 7 (1992).[7]

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[6] The State's decision to relitigate the reservation-boundary issue in state court was made despite the district court's admonition to the State and other defendants in Ute Indian Tribe that "a refusal of their officers to recognize legitimate tribal *judicial* and governmental authority on the reservation is . . . state interference with tribal sovereignty," see 521 F.Supp. at 1157 (emphasis added), and the court's announced expectation that "this [c]ourt's judgment will be approached by all parties with a spirit of open-minded cooperation." Id. Although Utah cited the court's expectation approvingly to the Tenth Circuit, see State's 10th Cir. Br. at 5, it failed to heed the court's advice. At the same time that it was professing that it would cooperate with the federal courts' judgment, see id., Utah consciously undertook to interfere with the Tribe's and United States' judicial jurisdiction by prosecuting Indians for offenses committed on lands clearly within the boundaries of the Uintah Valley Reservation, as those boundaries had been confirmed by the federal courts. E.g., State v. Perank, 191 Utah Adv. R. 5 (1992); State's Cert. Br. at 4a.

[7] In Perank, the defendant was the biological child of an enrolled member of the Ute Indian Tribe. Although Perank was not a member of the Tribe at the time he committed his offense, the Utah Supreme Court found him to be "Indian" based upon a provision of the Tribe's Constitution that extends membership to any person who is the natural child of an enrolled member of the Tribe who lived on the Reservation at the time the child was born. See State v. Perank, State's Cert. Br. at 12a. Without discussion, the Utah Supreme Court
(continued...)



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[7](...continued)
assumed that Perank's parents lived on the Reservation when Perank was born. Id.

In Hagen, the case now before this Court, the defendant is an enrolled member of the Little Shell Band of Chippewa Indians, which is not among the tribes appearing on the Bureau of Indian Affairs' list of recognized tribes. See 51 Fed. Reg. 25,115 (1986). Adding support to the Tribe's contention that the reservation-boundary issue should never have been reached in this action, see Brief of Amicus Curiae Ute Indian Tribe at 40-45, Hagen v. Utah, No. 92-6281, cert. granted, __ U.S. __, 113 S.Ct. 1840 (1993); see also Brief of the United States as Amicus Curiae at 5, n.4, id., the Ninth Circuit Court of Appeals has recently held that a member of the Little Shell Band is not an Indian for purposes of criminal jurisdiction. See LaPier v. McCormick, 968 F.2d 303 (9th Cir. 1993).

In Coando, the defendant was a "mixed-blood Ute", whose legal status as an Indian was terminated pursuant to the Act of Aug. 27, 1954, ch. 1009, 68 Stat. 868, codified at 25 U.S.C. §§ 677-677aa. Although terminated Utes are not Indian for purposes of criminal jurisdiction, see State v. Gardner, 827 P.2d 980 (Utah App. 1992), providing a basis for state jurisdiction regardless of the locus of the crime, cf. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973), the Utah Supreme Court elected to decide the Coando case on the basis that the Uintah Valley Reservation had been disestablished. See 191 Utah Adv. R. at 7.

The State did not seriously challenge any of the three defendants' assertions that they were Indian. In fact, in Perank (which was the State's first effort to relitigate the reservation-boundary issue in state court), Utah vehemently argued, contrary to the only tribe to which the defendant claimed any affiliation, that Perank *was* Indian. See Reply Brief of State of Utah, State v. Perank, (No. 860243), 191 Utah Adv. R. 5 (1992). Of course, the state courts would not need to address the reservation-boundary issue unless they first concluded that the defendants *were* Indian. See
(continued...)

Although the federal courts had already decided that the 1905 Act opened the Reservation and that the Act did not disestablish the Reservation, the Utah Supreme Court reached a contrary result. In a case involving "inadequate briefing", see State v. Perank, State's Cert. Br. at 64a (Zimmerman, J., dissenting), in which the United States and Tribe were not fully represented, the Utah Supreme Court wrongly concluded that the Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-64, rather than the 1905 Act, opened the Reservation. The Utah Supreme Court determined that language in the 1902 Act restoring the unallotted lands to the public domain, standing alone, expressed an intent to terminate the affected lands' reservation status and that the 1902-Act language remained in effect despite numerous amendments to the Act. On the basis of these determinations, the court found, in diametric opposition to the federal courts that previously had considered the issue,[8] that the Uintah Valley Reservation had been disestablished.

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[7](...continued)
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that states have jurisdiction to prosecute non-Indians for offenses committed in Indian country).

[8] See Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1400 (10th Cir. 1990), cert. denied, _ U.S. __, 111 S.Ct. 581 (1990) (reaffirming that the 1905, rather than the 1902, Act opened the Uintah Valley Reservation); Ute Indian Tribe v. Utah, 521 F.Supp. 1073 (D. Utah 1981), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).



This Court granted the petition for writ of certiorari to review the Utah Supreme Court's resolution of the reservation-boundary issue because it irreconcilably conflicts with the prior decisions of the federal courts on the same issue.[9]

## SUMMARY OF ARGUMENT

The statutory language of the Act of March 3 1905, ch. 1479, 33 Stat. 1048, 1069-70, opening the Uintah Valley Reservation to settlement under the homestead and townsite laws, does not include clear language evincing a Congressional intent to diminish the Reservation boundaries. Rather than establishing by substantial and compelling evidence that Congress harbored an intent to disestablish the Reservation, the legislative history of the 1905 Act confirms that Congress purposefully abandoned any intent to disestablish the unallotted lands from the Reservation. Accordingly, pursuant to this Court's clear analytical structure for determining when a particular surplus land act merely opened a reservation to settlement by non-Indians and when such an act disestablished the unallotted lands from the affected Reservation, this Court must decide that the boundaries of the Uintah Valley Reservation were not diminished by the opening of the Reservation to settlement by non-Indians.

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[9] The Tribe hopes that, in reviewing the Utah Supreme Court's decision, this Court will be mindful of the State's "extraordinary machinations to resist federal law" and the "context of events forced" upon the Court, the Tribe and the United States by Utah in this action. See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 696 n.36 (1979).

## ARGUMENT

### THE ACT OF MARCH 3, 1905, PROVIDED FOR THE SALE OF UNALLOTTED TRIBAL LANDS TO NON-INDIAN SETTLERS IN LANGUAGE AND UNDER CIRCUMSTANCES THAT REFLECT A CONGRESSIONAL INTENT TO LEAVE THE RESERVATION BOUNDARIES INTACT.

### A. Introduction

During the 19th century, large sections of the western United States were reserved from the Indians' vast aboriginal territory as homelands for this Nation's indigenous Indian tribes. However, towards the end of the century, the policy in Congress changed from one of isolating Indians from, to one of assimilating Indians into, mainstream American society. The "wisdom" in Congress was that Indians "should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately owned parcels of land." Solem v. Bartlett, 465 U.S. 463, 466 (1984). The shift in policy was reflected in the General Allotment Act of 1887, ch. 119, 24 Stat. 388. In that Act, the President had the discretion to make allotments of reservation lands to resident Indians and, with tribal consent, to sell the "surplus" unallotted lands to non-Indian settlers, with the proceeds from the sales being dedicated to the Indians' benefit. See DeCoteau v. District County Court, 420 U.S. 425, 432 (1975); Mattz v. Arnett, 412 U.S. 481, 496 (1973).

Because the President's authority under the General Allotment Act was discretionary, Congress often



enacted special legislation to ensure that a particular reservation was opened to settlement. Mattz v. Arnett, 412 U.S. at 481. Each of the special surplus land Acts employed its own statutory language, which was the product of a unique set of tribal negotiations and legislative compromise. See Solem v. Bartlett, 465 U.S. at 467.

Although the surplus land Acts contemplated the eventual termination of Indian reservations, this Court has unanimously held that the process of allotting reservation lands and opening the unallotted lands to non-Indian settlement is not inconsistent with continued reservation status.[10] See Mattz v. Arnett, 412 U.S. at 497. Therefore, the existence of a particular surplus land Act, alone, is not evidence of congressional intent to terminate a reservation. Id. at 496. However, the Court has acknowledged that, in a limited number of circumstances, Congress intended a particular surplus land Act to disestablish the opened area from the affected reservation. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975).

Congressional intent determines when a particular surplus land Act disestablished unallotted lands from a reservation and when such an Act simply offered non-Indians an opportunity to purchase lands opened for

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[10] The Court's reasoning seems especially sound because Congress repudiated the allotment and surplus land policy when it enacted the Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934).

settlement within the affected reservation.[11] See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977). "The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." Solem v. Bartlett, 465 U.S. 463, 470 (1984). There is a strong presumption that Congress intended the opened lands to remain in reservation status. As the Court has explained:

> This Court does not lightly conclude that an Indian reservation has been terminated • • • The congressional intent [to terminate] must be clear, to overcome "the general rule that 'doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973), quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1930). Accordingly, the Court requires that the "congressional determination to terminate . . . be *expressed on the face of the Act or be clear from the surrounding circumstances and legislative history*." Mattz v. Arnett, 412 U.S. at 505.

DeCoteau v. District County Court, 420 U.S. at 444 (emphasis added). On the other hand, under very limited circumstances, the Court will find Congress "*shared* the understanding that [a particular surplus land Act] would diminish a reservation" when:

> events surrounding the passage of a surplus land Act - particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of the legislative Reports presented to Congress - *unequivocally* reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation. . . .

Solem v. Bartlett, 465 U.S. at 471 (emphasis added). "To a lesser extent [the Court will also] look to events that occurred after the passage of a surplus land Act to decipher Congressional intent." Solem v. Bartlett, 465 U.S. at 471. However, there are limits to how far the Court will go to comprehend Congressional intent. Id. at 472. Unless the statutory language and the legislative history provide:

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[11] It must always be remembered that this is a jurisdictional dispute. Neither the Tribe nor the State has ever questioned who holds legal title to the lands at issue. Rather, the only dispute is whether *Indians* are subject to the laws of the Tribe and United States or of the State when they are on non-trust lands within the Uintah Valley Reservation.

The State has argued that resolution of the reservation-boundary question will subject non-Indians to tribal law. While a decision that the Reservation has been disestablished would subject *Indians* to the full panoply of *state* law for conduct on non-trust lands, a ruling that the non-trust lands remain a part of the Reservation would *not*, as the State suggests, subject non-Indians to the full complement of tribal laws. Decisions of this Court have severely restricted Indian tribes' authority over non-Indians. See Brendale v. Confederated Tribes of the Yakima Nation, 492 U.S. 408 (1989); Oliphant v. Suquamish Indian Tribe, 435 U.S. 119 (1978). Equally as important, the Ute Indian Tribe has disclaimed jurisdiction over non-Indians, except when their conduct directly affects the Tribe. E.g., § 1-2-5, Ute Law and Order Code.

> *substantial and compelling* evidence of a congressional intention to diminish Indian lands . . . this Court is bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.

Solem v. Bartlett, 465 U.S. at 472, quoting Mattz v. Arnett, 412 U.S. at 505; Seymour v. Superintendent, 368 U.S. 351 (1962) (emphasis added).

**B. Historical Perspective: The Indian Appropriations Acts of 1902, 1903, 1904 and 1905**

Congressional efforts to open the Uintah Valley Reservation to non-Indian settlement, which were initiated in the 19th Century, were renewed in 1902.[12] Pursuant to the Indian Appropriations Act of 1902, Congress provided that, with the consent of a majority of the adult male members of the Uintah and White River Bands,[13] the Uintah Valley Reservation would be allotted and the unallotted lands would be "restored to the public domain." Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-64.[14] After a deduction for the cost of allotting the lands, the proceeds from the sale of unallotted land were to be "used for the benefit of said Indians". Id. at 264. Finally, the Bands were to receive $70,064.48 "whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided."[15] Id. (Emphasis added).

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[12] The early efforts to open the Reservation, all of which failed because of the Utes' steadfast and unanimous opposition to accepting allotments and opening the Reservation, are discussed in Ute Indian Tribe v. Utah, 521 F.Supp. at 1111-14.

[13] Initially, the Uintah Valley Reservation was set aside for, and was settled by, the Uintah Band of Ute Indians. After an uprising on their reservation in Colorado, the members of the White River Band were removed to the Uintah Valley Reservation. Later, members of the Uncompahgre Band were permitted to purchase allotments on the Reservation. During the period in question (1902 - 1905), the Uncompahgre Band was not thought to have a legally protectable interest in the Uintah Valley Reservation.



[14] The relevant text of the 1902 Act is reproduced in State's Cert. Br. at 138a-140a.

[15] The payment was *not* to compensate the Tribe for opening the unallotted lands, but rather was:

> advanced as a compromise in settlement to [the Uintah and White River Utes' claim that they were entitled to the proceeds from the sale of allotments on the Uintah Valley Reservation to Uncompahgre Utes and for an earlier cession of land] and to remove all objection of the Indians to any arrangement for taking allotments and opening their reservation.

S.Rep. No. 951, 57th Cong., 1st Sess. 1, 3 (1902); LD 69.

Initially, President Theodore Roosevelt refused to sign the 1902 Act, in part because he found objectionable the Act's conditioning of the $70,064.48 payment upon the Indians' consenting to the restoration of their unallotted lands to the public domain. See Ute Indian Tribe v. Utah, supra, 521 F.Supp. at 1115-16. President Roosevelt signed the 1902 Act only after he received assurances that Congress would pass a joint resolution remedying his objections. See 521 F.Supp. at 1116.

In response to President Roosevelt's concerns, a Joint Resolution was passed on June 19, 1902.[16] Among other things, the Resolution provided that the $74,064.48:

> shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation . . .

J.Res. 31, 57th Cong., 1st Sess., 32 Stat. 744, 745 (1902).

The provisions of J.Res. 31 were incorporated into the Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-98.[17] In addition, Congress extended "the time for opening the reservation to public entry"; appropriated funds to survey the Reservation in preparation for making allotments thereon; and directed the Secretary of the Interior to:

> forthwith send an inspector to obtain the consent of the [Utes] to an allotment of their lands as directed by the Act of May [27, 1902], and if their consent, as therein provided, can not be obtained by June [1, 1903], then the Secretary of the Interior shall cause to be allotted to each [] Indian[] the quantity and character of land named and described in said Act.

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[16] The text of the Joint Resolution is reproduced in State's Cert. Br. at 140a-142a.

[17] The relevant text of the 1903 Act is reproduced in State's Cert. Br. at 142a-145a.



Id.

By the Indian Appropriations Act of 1904, Congress again extended "the time for opening the unallotted lands to public entry on the Uintah Reservation." See Act of April 21, 1904, ch. 1402, 33 Stat. 189, 207-208.[18]

By the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70, Congress provided that:

> the time for opening to public entry the unallotted lands on the Uintah Reservation having been fixed by law as the tenth day of March [1905], it is hereby provided that the time for opening of said reservation shall be extended to [September 1, 1905] . . . and the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands . . . *shall be disposed of under the general provisions of the homestead and town-site laws of the United States,* and shall be opened to settlement and entry by proclamation of the President . . .

Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069 (emphasis added).[19]

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[18] The text of the 1904 Act dealing with opening the Reservation is reproduced in State's Cert. Br. at 145a.

[19] The text of the 1905 Act dealing with the opening of the Reservation is reproduced in State's Cert. Br. at 145a-149a.

### C. There Is No Statutory Language of Termination, Abolishment or Cession in the Act Opening the Uintah Valley Reservation to Settlement by Non-Indians

This Court permits a finding that Congress intended to disestablish a reservation when the act opening a reservation to settlement contains clear language of termination, abolishment or cession. See DeCoteau v. District County Court, 420 U.S. at 444. Nothing in the language of the Indian Appropriation Acts of 1902-1905 expressly terminated, abolished or ceded the reservation status of the unallotted lands. Rather, the Acts merely specified the substantive manner in which the unallotted lands on the Reservation were to be opened to entry and settlement.

In the 1902 Act, Congress provided that the unallotted lands on the Uintah Valley Reservation would be opened by restoring them to the public domain.[20] See

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[20] The Tribe does not address the effect, if any, that the 1902 Act's provision restoring the unallotted lands to the public domain would have had on the Reservation boundaries because that provision of the 1902 Act was amended by the 1905 Act. See Part D, infra. Throughout the federal and state court litigation, Utah maintained that the manner in which the 1902 Act planned to open the Reservation, standing alone, effected a disestablishment of the unallotted lands. Utah's argument ignores this Court's counsel that "the question of whether lands are in the public domain is separate from the question of intent to disestablish." See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604 n.27 (1977). Accordingly, the Tribe does not concede, as Utah has argued, that language restoring the unallotted lands to the public domain would have disestablished those lands had the language of the 1902 Act taken effect.



Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-64. In 1905, Congress explicitly rejected restoring the unallotted lands to the public domain, see Part D, infra, and provided, instead, that the unallotted lands would be opened only under the homestead and townsite laws.[21] See Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70.

With respect to the *manner* in which the unallotted lands were to be opened, the language in the 1905 Act closely resembles the language used in other legislation that this Court has held opened, but not did not disestablish, unallotted lands from the affected reservations.

For example, the Act of March 22, 1906, ch. 1126, 34 Stat. 80, provided that the unallotted lands of the Colville Reservation "shall be open to settlement and entry under the provisions of the homestead laws . . .", id. at § 3, and under the townsite laws, id. at § 11. Seymour v. Superintendent, 368 U.S. 351, 355 (1962). This Court concluded that the provision "did no more than to open the way for non-Indian settlers to own land on

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[21] Even the Utah Supreme Court acknowledged that "[t]he language of the 1905 Act shows that Congress intended to amend the 1902 Act [] by limiting 'the manner of opening the lands'." State v. Perank, State's Cert. Br. at 42a. What the Utah Supreme Court failed to comprehend, or factor into its analysis, is that the statutory language that specifies "the manner of opening the [unallotted] lands" is *precisely* the language that this Court looks at to determine whether Congress intended to disestablish, or merely open to settlement, the unallotted lands. See Ute Indian Tribe v. Utah, 521 F.Supp. at 1122-23.

the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." 368 U.S. at 356.

Similarly, the Act of June 17, 1892, ch. 120, 27 Stat. 52, declared the unallotted lands of the Klamath River Reservation "to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands . . ." Mattz v. Arnett, 412 U.S. 481, 495 (1973). This Court found that the provisions of the 1892 Act, "do not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation." 412 U.S. at 497.

Finally, the Act of May 29, 1908, ch. 218, 35 Stat. 460, authorized the Secretary of the Interior "to sell and dispose of" a portion of the Cheyenne River Reservation. Solem v. Bartlett, 465 U.S. 463, 472 (1984). This Court found that the "reference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent." 465 U.S. at 473. Accordingly, this Court found that the Cheyenne River Reservation had been opened but not disestablished. 465 U.S. at 474.

In sensitive obedience, see State's 10th Cir. Br. at 3; Rec. Vol. XIX, No. 2, to this Court's previous decisions interpreting language virtually identical to that used in the 1905 Act, the federal courts correctly concluded that Congress did *not* intend to disestablish the unallotted Uintah Valley lands when it opened the Reservation to



entry and settlement under the homestead and townsite laws. See 521 F.Supp. at 1123; 773 F.2d at 1089.

Because they found no indication in the language of the 1905 Act remotely resembling a Congressional intent to disestablish the Uintah Valley Reservation, the federal courts then looked to the legislative histories of the Indian Appropriations Acts of 1902-1905 and concluded that they did not contain the requisite *substantial* and *compelling* evidence, see Solem v. Bartlett, 465 U.S. at 470, of a congressional intent to disestablish the unallotted lands.

### D. The Federal Courts Correctly Determined that the Legislative History Reflects that Congress Had Abandoned any Intent to Disestablish the Uintah Valley Reservation by 1905 and Consciously Chose to Merely Make the Unallotted Lands Available to Homestead and Townsite Entry

After an exhaustive recitation and analysis of the history of the opening of the Uintah Valley Reservation, see Ute Indian Tribe v. Utah, 521 F.Supp. at 1111-32, the federal district court determined that the 1905, rather than the 1902, Act opened, but did not disestablish, the Uintah Valley Reservation. See id. at 1154. By contrast, without referencing so much as a single word of the 1905 Act's legislative history, the Utah Supreme Court pronounced that nothing in that legislative history "indicates that Congress intended to repeal either the 1902 Act in total or the language of the 1902 Act restoring the unallotted lands to the public domain." See

State v. Perank, State's Cert. Br. at 41a. The Utah Supreme Court could not be more wrong.

The legislative history of the 1905 Act begins with the introduction of the Indian Appropriations bill for 1905-06, H.R. 17474, in the House of Representatives. The language referencing the Uintah Valley Reservation provided:

> [t]hat the time for opening the unallotted lands to public entry on the Uintah Reservation in Utah, as provided by the acts of May 27, 1902 and March 3, 1903, and April 21, 1904, be, and the same is hereby extended to October 1, 1905: Provided, That so much of said land as will be under the provisions of said acts *restored to the public domain* shall be open to settlement and entry by proclamation of the President of the United States . . .

39 Cong.Rec. 1180 (Jan. 21, 1905); LD 103 (emphasis added).[22]

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[22] Although H.R. 17474 refers to the 1902 Act as being operative and reiterates that the unallotted lands will be "restored to the public domain", the debate does not clearly indicate that the House intended to diminish the Reservation. See 39 Cong. Rec. at 1181-82 (extensive remarks by Utah Rep. Howell on the "opening" of the Reservation). More importantly, as in Mattz v. Arnett, 412 U.S. at 501-504, even if the *House* had intended to diminish the Reservation, the *Senate* rejected that notion.



Two weeks after the House passed H.R. 17474, Senator Smoot of Utah introduced S. 6867, which provided:

> [t]hat the time *for opening to public entry* the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the *manner of opening* such lands for settlement and entry, and for disposing of the same shall be as follows: That *the said unallotted lands*, excepting such tracts as may have been set aside as national forest reserve, *shall be disposed of under the general provisions of the homestead and townsite laws of the United States*; . . .

S. 6897, 58th Cong., 3d Sess.; LD 97 at 1-2 (emphasis added). In hearings held a few days later, the inclusion of S. 6867 in the Indian Appropriations bill was the subject of a colloquy among Senators Kearns and Smoot of Utah and Senator Teller of Colorado.[23] Senator Teller insisted upon the unallotted lands being restricted to settlement under the homestead and townsite laws. See "Indian Appropriations Bill, 1906" Hearings, Subcomm. of the

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[23] Senator Teller was a long-time, outspoken critic of the allotment and surplus lands policy. On an earlier allotment bill, he commented:

> This is a bill that, in my judgment, ought to be entitled, "A bill to despoil the Indians of their lands and to make them vagabonds on the face of the earth," because, in my view, that is the result of this kind of legislation . . .

See 11 Cong. Rec. 783, 934 (Jan. 20, 1881).

Sen. Comm. of Ind. Aff., 58th Cong., 3d Sess., at 29-30 (1905); LD 100.

As the Senate continued to debate the Indian Appropriations bill, the Commissioner of the General Land Office (which administered the public land laws) was asked to comment upon S. 6897. The Commissioner's response was only one of two documents that referenced the opening of the Uintah Valley Reservation in the report submitted by the Senate Committee on Indian Affairs on the Indian Appropriations bill. See S.Rep. No. 4240, 58th Cong., 3d Sess. 1; LD 102. In his letter, the Commissioner opined that "*the proposed bill [S. 6897] will repeal the act of May 27, 1902.*" Id.; LD 102 at 15 (emphasis added).

H.R. 17474 was amended, without debate, on the Senate floor to substitute S. 6897 for the House provision dealing with the manner in which the Uintah Valley Reservation was to be opened. 39 Cong. Rec. 3522 (Feb. 27, 1905); LD 103. The bill was referred to a conference committee. Again, without debate, the conference report struck the House version, substituting the Senate version which abandoned any language that would have restored the unallotted Uintah Valley lands to the public domain. See 39 Cong. Rec. at 3919; LD 103. The conference bill was enacted as the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70.

The legislative history reflects that, by conscious decision, Congress amended the manner in which it intended to open the Reservation under the 1902 Act. Instead of restoring the unallotted Uintah Valley lands to the public domain, Congress substituted language that



merely opened the Reservation to settlement and entry under the homestead and townsite laws. In addition, the 1905 Act deleted reference to the 1902 Act as the operative statute and declared "this [the 1905] Act" to be the opening statute. See Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069. By these amendments, Congress clearly altered the manner in which the unallotted lands of the Uintah Valley Reservation were to be opened.[24]

Despite the clear legislative history to the contrary, the Utah Supreme Court adduced that, because Congress did not expressly state on the face of the 1905 Act that it was repealing the "public domain" feature of the 1902 Act, the intent of the restoration language carried through to the 1905 Act. See State v. Perank, State's Cert. Br. at 41a-42a. However, after the court acknowledged that "the language of the 1905 Act shows that Congress intended to amend the 1902 Act by limiting 'the manner of opening the lands'," id., it *should* have analyzed whether the 1905 Act amended the 1902 Act to such an

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[24] The legislative history of the 1905 Act parallels that of the 1892 Act which this Court held did not effect a disestablishment of the Klamath River Reservation. As in Mattz, a House effort that may have disestablished the Reservation failed to accomplish its objectives when the Senate bill's language was substituted for that of the House. Like the Act in Mattz, the Senate version of what became the Act of March 3, 1905, allowed entry of the opened reservation only under the homestead and other specified laws. Compare Mattz v. Arnett, 412 U.S. at 501-504. Here, as this Court pointed out in Mattz, "Congress was fully aware of the means by which termination could be effected." Id. at 504. But clear termination language was *not* employed in the 1905 Act.

extent as to evince a Congressional intent to abandon any plan Congress may have had to diminish the Reservation boundaries.

The Acts in dispute and the language in dispute address the same subject, to wit: the substantive manner in which the Uintah Valley Reservation was to be opened. If, as Utah argues, the use of language restoring the unallotted lands to the public domain effects a disestablishment and if, as this Court has held in the past, e.g., Seymour v. Superintendent, 368 U.S. at 356, language merely opening the unallotted lands to settlement under the homestead laws does not effect a disestablishment, then the 1902 and 1905 Acts irreconcilably conflict with one another. The "cardinal rule . . . that repeals by implication are not favored", see Morton v. Mancari, 417 U.S. 535, 549-50 (1974), is overcome when a later statute "'expressly contradict[s] the original act'" and a construction that the earlier statute was impliedly repealed "'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all'". See Traynor v. Turnage, 485 U.S. 535, 547 (1988) (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976)).

In 1905, Congress deliberately rejected the manner in which the Reservation was to have been opened under the 1902 Act. For Congress' deliberate act to have any meaning, the provision of the 1902 Act specifying the manner in which the Reservation was to have been opened must be held to have been repealed by the conflicting provision in the 1905 Act. This Court should adhere to almost 30 years of Indian-law jurisprudence and find that the 1905-Act language opening the unallotted



Uintah Valley lands to settlement by non-Indians under the homestead and townsite laws did *not* disestablish those lands from the Reservation.[25]

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[25] In the past, this Court has found evidence of the Indians' consent to be probative in establishing a "shared understanding" between Congress and the Indians that the affected reservation would be diminished by a particular surplus land Act. E.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. at 591; DeCoteau v. District County Court, 420 U.S. at 436.

Pursuant to the Act of March 3, 1903, ch. 994, 32 Stat. 982, 997, James McLaughlin was dispatched to the Uintah Valley Reservation to obtain the Utes' consent to the allotment and opening of the Uintah Valley Reservation. After meeting with the Indian inspector for five consecutive days, only 82 of the 280 adult male Utes were persuaded to consent to allotment. See Consent Form of Uintah and White River Utes (May 23, 1903); LD 164. Even those who consented to allotment were opposed to opening the Reservation, and executed the Consent Form as a gesture of good faith to the government. See H.Doc. 33 at 7, 58th Cong., 1st Sess. (Dec. 1, 1903); LD 92.

The Utes' unanimous opposition to opening the Reservation negates any finding that they "shared" an understanding that the Reservation would be diminished. Moreover, McLaughlin's discussions with the Utes focused on opening the Reservation pursuant to the *manner* prescribed in the 1902 Act. See id. at 1. As discussed above, the Reservation was opened in the *manner* prescribed in the 1905 Act. Therefore, any discussions between McLaughlin and the Utes were irrelevant except to the extent, if any, that they influenced Congress to abandon any intent it may have had to disestablish the Reservation.

### E. The Circumstances Surrounding the Opening of the Reservation Are Grossly Inconsistent and Must Be Resolved in Favor of a Finding that the Unallotted Lands Were Not Disestablished

After finding that the statutory language and legislative history of the 1905 Act did not indicate a Congressional intent to disestablish the unallotted Uintah Valley lands from the Reservation, the federal courts examined the subsequent treatment accorded the unallotted lands by Congress and the executive branch, see 521 F.Supp. at 1132-36, 1142-49; 773 F.2d 1088-89, and concluded that they did not disclose any contrary legislative intent.

On July 14, 1905, President Theodore Roosevelt issued a proclamation specifying the procedural manner in which the Uintah Valley Reservation was to be opened. See Presidential Proclamation of July 14, 1905, 34 Stat. 3119; LD 108.[26] The Utah Supreme Court found that because the Proclamation "quot[es] the language from the 1902 Act that 'restored' the unallotted land to 'the public' domain'", see State v. Perank, State's 10th Cir. Br. at 46a, the President deemed the provision to be operative statutory language that remained in effect. Id. However, the quotation to the "restoration" language appears in the first paragraph of the Proclamation, in the context of citing the statutes that authorized the President to issue the Proclamation in the first place. The "restoration" language is *not* quoted as specifying the

[26] The Presidential Proclamation is reproduced in State's Cert. Br. at 155a-162a.



*substantive manner* in which the Reservation was to be opened.

In referencing the *substantive manner* in which the Reservation was to be opened, the Proclamation tracks the language of the 1905 Act, providing:

> *that all the unallotted lands in said reservation*, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, *will on and after the 28th day of August, 1905, in the matter hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States. . .*

34 Stat. 3119 (emphasis added). Thus, the operative language of the Presidential Proclamation acknowledges that the substantive manner of opening the unallotted lands on the Uintah Valley Reservation was amended by the 1905 Act, and was restricted to entry under the homestead and townsite laws.[27]

[27] Even if the President were under the mistaken belief that the 1902 Act prescribed the manner in which the Reservation was to be opened, that belief is entitled to no weight, given that the legislative history clearly reflects that, in 1905, Congress deliberately rejected restoring the lands to the public domain. See Public Employees Retirement System v. Betts, 492 U.S. 158, 171 (1989) (even a contemporaneous and longstanding executive interpretation that conflicts with the plain language of a statute is entitled to no deference).

Perhaps not surprisingly, given that the United States and Tribe were not parties to the proceedings, in discussing Congress' subsequent treatment of the unallotted lands, the Utah Supreme Court mentioned only subsequent Acts and legislative materials in which the Reservation was referred to in the past tense. See State v. Perank, State's Cert. Br. at 48a-52a. In contrast, the federal district court carefully analyzed the evidence presented by the United States, the Tribe and the State on the subsequent treatment accorded the Reservation by Congress, see 521 F.Supp. at 1132-36, including those statutes and legislative materials in which the Reservation was referred to in the present tense. Id. at 1134. After reviewing *all* of the relevant evidence, the district court concluded that it could:

> discern no clear congressional intent to disestablish the unallotted lands of the Uintah [Valley] Reservation evidenced by past-tense, 'former' references. Not only are the references grossly inconsistent when considered together, they arise from a specific source, the Utah delegation, ca. 1906, and they virtually cease after the retirement of Senator Southerland from the Senate in 1917, and furthermore, they are merely passing references in text, not deliberate expressions of informal conclusions about congressional intent in 1905. Compare United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 590-593 (1957).

521 F.Supp. at 1135. Accordingly, the district court concluded that the subsequent treatment did not indicate



that Congress believed that the unallotted lands had been disestablished. See id.

Just as it overlooked Congressional references to the Reservation in the present tense, the Utah Supreme Court overlooked the treatment accorded the Reservation by the executive branch when such treatment *affirmed* the Reservation's continuing existence. See 521 F.Supp. at 1142-45. Instead, the State court addressed only those actions by the executive branch that supported a conclusion that the unallotted lands had been disestablished. See State v. Perank, State's Cert. Br. at 52a-55a. Similarly, the Utah Supreme Court completely ignored the jurisdictional history of the Reservation, which, after being reviewed at length by the federal district court, see 521 F.Supp. at 1145-50, was characterized as being "[certainly] not one of 'unquestioned' exercise of state authority." See 521 F.Supp. at 1146.[28]

While it may have been easier for the Utah Supreme Court to ignore the inconsistencies in the subsequent treatment of the Reservation, this Court does not endorse such intellectual dishonesty. See Solem v. Bartlett, 465 U.S. at 475 (discussing evidence which made it more difficult for the Court to conclude that the Cheyenne River Reservation had not been disestablished).

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[28] Because of space limitations, the Tribe is unable to discuss all of the evidence on subsequent treatment of the unallotted lands that was presented to and discussed by the federal district court. The federal district courts' comprehensive analysis of the evidence presented by the Ute Indian Tribe parties appears at 521 F.Supp. 1124-36, 1142-50.

More importantly, by failing to mention the inconsistencies, the Utah Supreme Court created the impression that the subsequent treatment accorded the Reservation by Congress and the executive branch clearly and unambiguously indicated that the Reservation had been diminished. However, as acknowledged by the federal district court and as disclosed by *the totality* of evidence, the subsequent treatment of the Reservation *was* "grossly inconsistent". See 521 F.Supp. at 1135. As this Court has acknowledged on numerous occasions, doubtful expressions must be resolved in favor of the Indians. E.g., McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973). Accordingly, the gross inconsistencies in the subsequent treatment accorded the unallotted lands must be resolved with a finding that the unallotted Uintah Valley lands were *not* disestablished from the Reservation.

## CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the Utah Supreme Court and expressly affirm that the unallotted Uintah Valley lands were opened, but not disestablished from, the Reservation and that the Reservation boundaries remain undiminished.



Respectfully submitted,

Robert S. Thompson, III
*Counsel of Record*
Sandra Hansen
Jeanne S. Whiteing
WHITEING & THOMPSON
1136 Pearl Street
Suite 203
Boulder, Colorado 80302
(303) 444-2549

*Counsel for Amicus Curiae*
*Ute Indian Tribe*

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No. 92-6281

# In The Supreme Court of the United States

October Term, 1993

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Robert P. Hagen,

*Petitioner,*

v.

State of Utah,

*Respondent.*

---

**On Writ of Certiorari to the Supreme Court of the State of Utah**

---

## BRIEF FOR FREMONT COUNTY, WYOMING AND LAKE COUNTY, MONTANA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT STATE OF UTAH

---

William R. Flagg
Fremont County Attorney
South Federal Blvd.
Riverton, WY 82501
(307) 332-7204

Edward L. Newell, II
Deputy County Attorney
Fremont County Courthouse
Lander, WY 82520
(307) 332-2257

Larry Nistler
Lake County Attorney
106 4th Ave. East
Polson, MT 59860
(406) 883-6211

James M. Johnson *
Attorney at Law
1110 S. Capitol Way, #407
Olympia, WA 98501
(206) 357-3104

* Counsel of Record

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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No. 92-6281

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ROBERT P. HAGEN,
*Petitioner*,
v.
STATE OF UTAH,
*Respondent*.

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**On Writ of Certiorari to the Supreme Court of the State of Utah**

---

## BRIEF FOR FREMONT COUNTY, WYOMING AND LAKE COUNTY, MONTANA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT STATE OF UTAH

---

### INTERESTS OF *AMICI* COUNTIES

Fremont County, Wyoming, and Lake County, Montana have joined to file this brief. The interests of these counties and their residents are similar, and identical to those of Duchesne County, Utah, in which Petitioner Hagen and Mr. Perank [1] committed their crimes. The Counties urge this Court to affirm the decision of the Utah Supreme Court.

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[1] It is the decision in the companion *Perank*'s case which provides the analysis for *Hagen*. Mr. Perank, however, did not petition this Court for certiorari.

Abstract jurisdictional questions decided in courts, and lines on maps showing county and reservation boundaries become concrete realities when county governments provide to their residents services such as police, and zoning (and collect taxes to pay for those services). (*See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *Brendale v. Confederated Tribes and Bands of the Yakima Reservation*, 492 U.S. 408 (1989).

To Mr. Perank's victim(s), it is exceedingly important whether county sheriffs or city police will respond to their calls. To the counties, it is important that they can do so, as well as providing other services.

Both *Amici* counties have within their borders lands which were at one time within the exterior boundaries of reservations set aside for the sole use of Indian tribe(s). In both cases, those reservations were later disestablished or diminished by Act of Congress, in the same fashion as was the case here. Substantial populations of non-Indians settled, and established local governments, including these counties. While Indians participate in these political processes and share in the benefits, non-Indians are barred from participating in tribal government. (More correctly, non-*members* are barred.) *See Duro v. Reina*, 495 U.S. 676 (1990) at 688 and 695.

Both the Flathead and the Wind River Acts were enacted by Congress at roughly the same time historically, as the Acts considered herein and the first Act considered in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), which this Court determined to accomplish disestablishment. (The Flathead Act was enacted the same day as the Rosebud Act. The Wind River disestablishment was negotiated by the same Inspector McLaughlin as Rosebud, for the same purposes. *See* Appendices A and C.) The three acts are reprinted as Appendices to this brief for ease of comparison.

The Wind River Reservation is located in lands within the State of Wyoming, some of which are now within



the boundaries of *Amicus* Fremont County. Like most counties, Fremont is the local government exercising jurisdiction over such important matters as law enforcement, health and land use planning and environmental regulation. In 1905, Congress passed the Wind River Cession Act of 1905 (Act of March 3, 1905, 33 Stat. 1016, Appendix C) to disestablish a portion of that reservation which had been in this same geographical area. After the President opened these lands, most of these areas were never subsequently considered to be part of the reservation (with the exception of lands held in trust by the United States).

This explicitly "Cession" Act has also been considered by Wyoming Courts on several occasions. Like the Utah Supreme Court, the Wyoming Supreme Court held the Acts to extinguish the affected portions of that reservation:

> . . . [T]he lands between Owl Creek and Wind River to the south were ceded and relinquished to the United States, and became a part of the public domain of the United States until granted out and conveyed by the United States to the settlers thereon, and were open to settlement under the Homestead Laws . . . no Indian Reservation exists so far as the lands of the plaintiffs are concerned . . . .

*Merrill v. Bishop*, 237 P.2d 186, 187, 193 (Wy. 1951).

This analysis was repeated in a later case:

> [The United States] made an agreement with the Shoshone and Arapahoe tribes of Indians belonging to the Shoshone or Wind River Reservation in the State of Wyoming in which it was provided: "Article I. The said Indians . . . for the consideration hereafter named do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation, except the lands within and bounded by the following described lines . . ." The land actually ceded is the land now shown to be part of Fremont County but not within the reservation.

*Blackburn v. State*, 357 P.2d 171 (Wyo. 1960). *See also, State v. Moss*, 471 P.2d 333 (Wyo. 1970).

The Flathead Reservation was established in what is now Montana in 1855 by the Treaty of Hell Gate, 12 Stat. 975. By Act of April 23, 1904, 33 Stat. 302, some lands of the reservation were allotted to individual Indians, and the unallotted lands opened to public settlement and entry.[2] The one million remaining for non-Indian entry and settlement were opened on May 2, 1910, pursuant to the Presidential Proclamation of May 22, 1909. About half the original acreage is now held in trust for tribes and Indians, and the remainder held in fee, primarily by non-Indians (more than two-thirds the area population is non-Indian).

Notwithstanding the history of the Flathead Reservation, and Congress' intent to disestablish, the Ninth Circuit Court of Appeals held in *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), that the reservation remained in its original boundaries.

*Amici* are concerned that the analytical changes urged upon the Court by the United States and Petitioner and accepted by the Tenth Circuit could call into question prior law and the long-standing understandings of Fremont County residents, a vast majority of whom are non-Indian, or if Indian, not members of the Wind River Reservation tribes.

Such problems have already occurred with respect to the Flathead reservation due to a Ninth Circuit Court of Appeals decision which (like the Tenth Circuit Court of Appeals decision discussed in this case) incorrectly applies this Court's analysis of reservation diminishment.

[2] Later acts also set aside acreage for power and reservoir sites, a Bison Range, and granted lands to Montana for school purposes (Act of April 23, 1904, 33 Stat. at 303; Act of May 23, 1908, 35 Stat. 251, 267; Act of March 3, 1909, 35 Stat. 1039, 1051.



## SUMMARY OF ARGUMENT

The criteria for determination of when a reservation has been extinguished or diminished are set forth in this Court's decisions, especially *Rosebud, supra*, and *DeCoteau v. District County Court*, 420 U.S. 425 (1975). States, counties, tribes and inhabitants of affected (or potentially-affected) lands have relied upon the historical understanding reflected in that analysis in making decisions where to make their homes and conduct their business. The decision of the Utah Supreme Court applies the correct standards to determine the intent of Congress and should be affirmed.

## ARGUMENT

From the passage of the General Allotment Act into the Early 20th Century, Congress utilized a format approach to diminishing (or extinguishing) reservations in the West, several of which were considered by this Court in *Rosebud, supra*, and *DeCoteau, supra*. The Act herein, like the Acts affecting *Amici*, were the same as those Acts, and intended to accomplish the same result. This intent of Congress should not be frustrated by the courts.

Language of cession and restoring to the public domain terminology were both utilized by Congress to effect disestablishment, to remove the lands from the reservation. When bolstered by corroborating history of Congress' intent, that result must be confirmed.

The Rosebud Sioux Cession Act considered by this Court in *Rosebud* was so similar to the Wind River Cession Act that the Arapaho Tribe of the Wind River Reservation filed a brief and the Shosone Tribe joined in an *amici* brief in that case.[3] In the latter *amici* brief, the Wind River Cession Act of 1905 was specifically brought to the attention of this Court referring to the several acts

[3] The Acts are appended.

which had opened reservations to public settlement, noting:

> [Many Acts were] . . . patterned upon the General Allotment Act but applying to particular Indian reservations. The three Rosebud acts at issue herein are among the latter as are the statutes involving each of the four amici tribes.

Brief of *Amici Curiae* National Congress of American Indians at 4, 12, *Rosebud*.

The Court held, of course, that the portion of the reservation in question had been disestablished. By implication, the tribal arguments involving the Wyoming Wind River Act were also rejected. The analysis set forth by this Court surely dictates that result. Language of cession was intended to, and does accomplish, extinguishment of (portions of) a reservation. The combination of allotment of some lands to Indians, and the opening of the remainder to settlement and entry also should work disestablishment of the affected portion, where the circumstances confirm that was the intent of Congress.

This Court should confirm the analysis provided in the above-cited cases, because of the substantial reliance of the citizens and affected governmental bodies. It is worth noting, that the analysis itself is, in part, intended to take into account those expectations, as expressed in Congress by the representatives from these areas and subsequently confirmed by governmental treatment of the lands in question, and their occupants (especially by the United States). For years, Counties such as *Amicus* Fremont have provided law enforcement and other services (and funded these services). Until the decisions of the Ninth Circuit Court culminating in *Namen, supra, amicus* Lake County did the same.[4]

[4] Montana has "Public Law 280 Jurisdiction" (Act of August 15, 1953, 67 Stat. 590). Some problems have been ameliorated by this fact, and cooperative efforts with the tribes.



The United States, on the other hand, has not historically provided such services but, rather, has treated the areas as outside the reservation.

For example, Congress referred to the ceded area as the "former" Shoshone or Wind River Reservation, and referred to the remainder as the "diminished" Reservation. Act of April 4, 1910, 36 Stat. 267, 288. "Former Shoshone or Wind River Indian Reservation," 46 Cong. Rec. 3005, 3698 (1910) and "former Shoshone or Wind River Indian Reservation" and "lands referred to were ceded," S. Rep. No. 357, 61st Cong., 2d Sess. 45 (1910). Congress selected for the new diminished reservation boundary natural geographic features, including waterways, which had previously divided the reservation. H.R. Rep. No. 2355, 58th Cong., 2d Sess. (1904).

Such references continue through history, in the case of the Wind River Cession [5], as they do in the case here. This Court has held that cession terminology is "precisely suited" to disestablishment, (*DeCoteau v. District County Court*, 420 U.S. 425 at 445 (1975), and that when reservation lands were restored to the "public domain," this unequivocally removed them from the reservation. Even Justice Marshall in *Solem v. Bartlett*, 465 U.S. 463 (1984), continued to recognize the importance of cession. *Solem* at 470-471. He also adhered to his *Rosebud* dissent in recognizing "public domain" as express language

[5] In providing lease authority, Congress referred to "within the ceded portion of the . . . reservation." Act of August 21, 1916, 39 Stat. 519 following a Report referring to "the former limits of the reservation (S. Rep. No. 712, 64th Cong., 1st Sess. 1916 and debate including "this is not land on an Indian Reservation." 53 Cong. Rec. 121159 (1916). Still a later, reference to "the diminished and ceded portions," Act of July 27, 1939, 53 Stat. 1128, 1129 and the Act of August 15, 1953, 67 Stat. 592 providing for "damages arising out of the cession to the United States pursuant to the Act of March 3, 1905 (33 Stat. 1016) of that part of the former Wind River Indian Reservation . . . ." 67 Stat. at 592 and same references in supporting Reports H. Rep. No. 269, and S. Rep. No. 644, 83d Cong., 1st Sess. (1953).

of disestablishment, *Solem* at 470-471; *Rosebud* at 618, n.3.

Changing this analysis is not only unfair to those who relied historically upon Congress' understanding and intent, but would have severe detrimental effects, as illustrated by the nearly daily occurrences which give rise to the two cases below. Routine law enforcement by local officials whose actions serve to protect all citizens of the affected area suffers. It is not surprising that the petitioner, criminal defendant below, wishes his conviction overturned. It is surprising, and disappointing that the United States supports that result, and in a fashion that would complicate or make more difficult law enforcement in many areas around the country. There is little to assure local citizens that the United States will assume the resultant law enforcement burden.[6] If this issue is not settled, there is reason to anticipate additional, protracted litigation from areas around the West in which the non-reservation status of the lands was once deemed finally determined by Congress.

## CONCLUSION

It is apparent there is a need for this Court to exercise its supervisory role over the Court of Appeals to keep them from "remak(ing) history" (*DeCoteau*, 420 U.S. at 440) in order to resurrect extinguished portions of reservations in disregard of the decisions of this Court which properly implement the intent of Congress.

There is surely no reason for this Court to depart from the settled rules for determination of extinguishment and diminishment of reservations, as set forth in *DeCoteau*, and *Rosebud*. The citizens have relied upon it,

[6] *See Duro v. Reina, supra,* in which the United States failed to prosecute a murder in a case of questionable jurisdiction for others, but clear jurisdiction for the United States. "For felonies, such as the murder alleged in this case at the outset, federal jurisdiction is in place . . ." *Duro* at 695.



and law enforcement often depends on it. The judgment of the Utah Supreme Court should be affirmed.

DATED this 17th day of August, 1993.

Respectfully submitted,

WILLIAM R. FLAGG
Fremont County Attorney
South Federal Blvd.
Riverton, WY 82501
(307) 332-7204

EDWARD L. NEWELL, II
Deputy County Attorney
Fremont County Courthouse
Lander, WY 82520
(307) 332-2257

LARRY NISTLER
Lake County Attorney
106 4th Ave. East
Polson, MT 59860
(406) 883-6211

JAMES M. JOHNSON *
Attorney at Law
1110 S. Capitol Way, #407
Olympia, WA 98501
(206) 357-3104

* Counsel of Record

# APPENDIX

# APPENDIX

## The Rosebud Act of April 23, 1904

CHAP. 1484.—An act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provision to carry the same into effect.

Whereas James McLaughlin, United States Indian inspector, did, on the fourteenth day of September, anno Domini nineteen hundred and one, make and conclude an agreement with the male adult Indians of the Rosebud Reservation, in the State of South Dakota, which said agreement is in words and figures as follows:

This agreement made and entered into on the fourteenth day of September, nineteen hundred and one, by and between James McLaughlin, United States Indian inspector, on the part of the United States, and the Sioux tribe of Indians belonging on the Rosebud Reservation, in the State of South Dakota, witnesseth:

ARTICLE I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel of latitude to its intersection with the tenth guide meridian; thence north along said guide meridian to its intersection with the township line between townships one hundred and one

hundred and one north; thence east along said township line to the point of beginning, the unallotted land hereby ceded approximating four hundred and sixteen thousand (416,000) acres, lying and being within the boundaries of Gregory County, South Dakota, as said county is at present defined and organized.

ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement the United States stipulates and agrees to expend for and pay to said Indians, in the manner hereinafter provided, the sum of one million and forty thousand (1,040,000) dollars.

ARTICLE III. It is agreed that of the amount to be expended for and paid to said Indians, as stipulated in Article II of this agreement, the sum of two hundred and fifty thousand (250,000) dollars shall be expended in the purchase of stock cattle, of native range or graded Texas two-year-old heifers and graded Durham or Hereford two-yearold bulls, for issue to said Indians, to be distributed as equally as possible among men, women, and children as soon as practicable after the ratification of this agreement, and that the sum of seven hundred and ninety thousand (790,000) dollars shall be paid to said Indians per capita in cash in five annual installments of one hundred and fifty-eight thousand (158,000) dollars each, the first of which cash payments shall be made within four months after the ratification of this agreement.

ARTICLE IV. It is further agreed that all persons of the Rosebud Indian Reservation, South Dakota, who have been allotted lands and who are now recognized as members of the tribe belonging on said reservation, including mixed-bloods, whether their white blood comes from one paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians



upon the reservation; and that white men heretofore lawfully intermarried into the tribe and now living with their families upon said reservation shall have the right of residence thereon, not inconsistent with existing statutes.

ARTICLE V. It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.

ARTICLE VI. This agreement shall take effect and be in force when signed by U. S. Indian Inspector James McLaughlin and by three-fourths of the male adult Indians parties hereto, and when accepted and ratified by the Congress of the United States.

In witness whereof the said James McLaughlin, U. S. Indian inspector, on the part of the United States, and the male adult Indians belonging on the Rosebud Reservation, South Dakota, have hereunto set their hands and seals at Rosebud Indian Agency, South Dakota, this fourteenth day of September, A. D. nineteen hundred and one.

JAMES MCLAUGHLIN,
U. S. Indian Inspector.

| No. | Name | Mark | Age |
|---|---|---|---|
| 1 | He Dog | x | 65 |
| 2 | High Hawk | x | 50 |
| 3 | Black Bird | x | 62 |
| | (and 1,028 more Indian signatures.) | | |

We, the undersigned, hereby certify that the foregoing agreement was fully explained by us in open council to the Indians of the Rosebud Agency, South Dakota; that

it was fully understood by them before signing, and that the foregoing signatures, though names are similar in some cases, represent different individuals in each instance, as indicated by their respective ages.

WILLIAM BORDEAUX, Official Interpreter.
WM. F. SCHMIDT, Special Interpreter.

ROSEBUD AGENCY, S. DAK., October 4, 1901.

We, the undersigned, do hereby certify that we witnessed the signatures of James McLaughlin, United States Indian inspector, and the 1,031 Indians of the Rosebud Agency, S. Dak., to the foregoing agreement.

FRANK MULLEN, Agency Clerk.
C. H. BENNETT, Farmer, Cut Meat District.
JOHN SULLIVAN, Farmer, Black Pipe District.
FRANK ROBINSON, Farmer, Little White River District.
FRANK SYPAL, Farmer, Butte Creek District.
ISAAC BETTELYOUN, Farmer, Big White River District.
JAMES A. MCCORKLE, Farmer, Ponca District.
LOUIS BORDEAX, Ex-Farmer, Agency District.

ROSEBUD AGENCY, S. DAK., October 4, 1901.

I certify that the total number of male adult Indians over 18 years of age belonging on the Rosebud Reservation, S. Dak., is 1,359, of whome 1,031 have signed the foregoing agreement, being 12 more than three-fourths of the male adult Indians of the Rosebud Reservation, S. Dak.

CHAS. E. MCCHESNEY,
United States Indian Agent.

ROSEBUD AGENCY, S. DAK., October 4, 1901.

Therefore,



*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the said agreement be, and the same hereby is, accepted, ratified, and confirmed as herein amended and modified; as follows:

"ARTICLE I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel of latitude to its intersection with the tenth guide meridian; thence north along said guide meridian to its intersection with the township line between townships one hundred and one hundred and one north; thence east along said township line to the point of beginning, the unallotted land hereby ceded approximating four hundured and sixteen thousand acres, lying and being within the boundaries of Gregory County, South Dakota, as said county is at present defined and organized.

"ART. II. In consideration of the land ceded, relinquished, and conveyed by article one of this agreement, the United States stipulates and agrees to dispose of the same to settlers under the provisions of the homestead and town-site laws, except sections sixteen and thirty-six, or an equivalent of two sections in each township, and to pay to said Indians the proceeds derived from the sale of said lands; and also the United States stipulates and agrees

to pay for sections sixteen and thirty-six, or an equivalent of two sections in each township, two dollars and fifty cents per acre.

"ART. III. It is agreed that of the amount to be derived from the sale of said lands to be paid to said Indians, as stipulated in article two of this agreement, the sum of two hundred and fifty thousand dollars shall be expended in the purchase of stock cattle, of native range or graded Texas two-year-old heifers and graded Durham or Hereford two-year-old bulls, for issue to said Indians, to be distributed as equally as possible among men, women, and children, but not more than one half of the money received in any one year shall be expended as aforesaid, and the other half shall be paid to said Indians per capita in cash, and an accounting, settlement, and payment shall be made in the month of October in each year until the lands are fully paid for and the funds distributed in accordance with this agreement: *Provided, however,* That not more than five hundred thousand dollars shall be expended or paid within two years after the ratification of this agreement, and not to exceed one hundred and fifty thousand dollars in each of the following years until the expiration of five years.

"ART. IV. It is further agreed that all persons of the Rosebud Indian Reservation, South Dakota, who have been allotted lands and who are now recognized as members of the tribe belonging on said reservation, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians upon the reservation; and that white men heretofore lawfully intermarried into the tribe and now living with their families upon said reservation shall have the right of residence thereon, not inconsistent with existing statutes.



"ART. V. It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement."

SEC. 2. That the lands ceded to the United States under said agreement, excepting such tracts as may be reserved by the President, not exceeding three hundred and ninety-eight and sixty-seven one-hundredths acres in all, for subissue station, Indian day school, one Catholic mission, and two Congregational missions, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *And provided further,* That the price of said lands entered as homesteads under the provisions of this act shall be as follows: Upon all land entered or filed upon within three months after the same shall be opened for settlement and entry, four dollars per acre, to be paid as follows: One dollar per acre when entry is made; seventy-five cents per acre within two years after entry; seventy-five cents per acre within three years after entry; seventy-five cents per acre within four years after entry, and seventy-five cents per acre

within six months after the expiration of five years after entry. And upon all land entered or filed upon after the expiration of three months and within six months after the same shall be opened for settlement and entry, three dollars per acre, to be paid as follows: One dollar per acre when entry is made; fifty cents per acre within two years after entry; fifty cents per acre within three years after entry; fifty cents per acre within four years after entry, and fifty cents per acre within six months after the expiration of five years after entry. After the expiration of six months after the same shall be opened for settlement and entry the price shall be two dollars and fifty cents per acre, to be paid as follows: Seventy-five cents when entry is made; fifty cents per acre within two years after entry; fifty cents per acre within three years after entry; fifty cents per acre within four years after entry, and twenty-five cents per acre within six months after the expiration of five years after entry: *Provided*, That in case any entryman fails to make such payment or any of them within the time stated all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and held for cancellation and the same shall be cancelled: *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry, as now provided by law, where the price of the land is one dollar and twenty-five cents per acre: *And provided further*, That all lands herein ceded and opened to settlement under this act, remaining undisposed of at the expiration of four years from the taking effect of this act, shall be sold and disposed of for cash, under rules and regulations to be prescribed by the



Secretary of the Interior, not more than six hundred and forty acres to any one purchaser.[1]

SEC. 3. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and paid to the Rosebud Indians or expended on their account only as provided in article three of said agreement as herein amended.

SEC. 4. That sections sixteen and thirty-six of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose; and in case any of said sections, or parts thereof, of the land in said country of Gregory are lost to said State of South Dakota by reason of allotments thereof to any Indians, now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract herein ceded, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

SEC. 5. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of seventy-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section four of this act.

SEC. 6. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to

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[1] 38 L. D., 213.

dispose of said land except as provided herein; or to guarantee to find purchasers for said lands, or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale therof only as received, as herein provided.

Approved, April 23, 1904.



**The Flathead Act of April 23, 1904**

CHAP. 1495.—An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and headmen, and delegates of the confederated tribes of the superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

SEC. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, the said persons so constituting said commission to be as follows: Two of said commissioners so named by the

President shall be two persons now holding tribal relations with said Indians—the same may be designated to the President by the chiefs and headmen of said confederated tribes of Indians, two of said commissioners shall be resident citizens of the State of Montana, and one of said commissioners shall be a United States special Indian agent inspector of the Interior Department.

SEC. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of siad Flathead Indian Reservation and organize by the election of one of their number as chairman. Said commission is hereby empowered to select a clerk at a salary not to exceed seven dollars per day.

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

SEC. 6. That said commission shall in their report of lands of the third class determine as nearly as possible the amount of standing saw timber on legal subdivisions thereof and fix a minimum price for the value thereof, and in determining the amount of merchantable timber growing thereon they shall be empowered to employ a timber cruiser, at a salarly of not more than eight dollars per day while so actually employed, with such assistants as may be necessary, at a salary not to exceed six dollars per day while so actually employed. Mineral lands shall not be appraised as to value.

SEC. 7. That said commissioners, excepting said special agent and inspector of the Interior Department, shall



be paid a salary of not to exceed ten dollars per day each while employed in the inspection and classification of said lands; such inspection and classification to be fully completed within one year from date of the organization of said commission.

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish Wars, as defined and described in sections twenty-three hundred

and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *Provided further,* That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and culticate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsover shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided,* That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided,* That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.[1]

SEC. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by

[1] 41 L. D.,521.



said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: *Provided,* That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.

SEC. 11. That all said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, under such rules and regulations as he may prescribe.

SEC. 12.[2] That the President may reserve and except from said lands not to exceed nine hundred and sixty acres for Catholic mission schools, church, and hospital and such other eleemosynary institutions as may now be maintained by the Catholic Church on said reservation, which lands are hereby granted to those religious organizations of the Catholic Church now occupying the same, known as the Society of Jesus, the Sisters of Charity of Providence, and the Ursuline Nuns, the said lands to be granted in the following amounts, namely, to the Society of Jesus, six hundred and forty acres, to the Sisters of Charity of Providence, one hundred and sixty acres, and to the Ursuline Nuns, one hundred and sixty acres, such lands to be reserved and granted for the uses indicated only so long as the same are maintained and occupied by said organizations for the purposes indicated. The President is also authorized to reserve lands upon the same conditiions and for similar purposes for any other missionary or religious societies that may make application therefor within one year after the passage of this act, in such quantity as he may deem proper. The President may also reserve such of said lands as may be convenient or necessary for the occupation and maintenance of any and all agency buildings, substations,

[2] A substitute for sec. 12 was enacted in sec. 9 of the act of 1905, ch. 1479, 33 Stat., 1080, post, p. 157.

mills, and other governmental institutions now in use on said reservation or which may be used or occupied by the Government of the United States.

SEC. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to settlement under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

SEC. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect.

SEC. 15. That there is hereby appropriated out of the Treasury not otherwise appropriated, the sum of one



hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of Montana and for lands reserved for agency, school, and mission purposes, as provided in sections eight and twelve of this act, at the rate of one dollar and twenty-five cents per acre; also the sum of seventy-five thousand dollars, or so much thereof as may be necessary, the same to be reimbursable out of the funds arising from the sale of said lands to enable the Secretary of the Interior to survey the lands of said reservation as provided in section one of this act.

SEC. 16. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts mentioned in section twelve, or to dispose of said land except as provided herein, or guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

Approved, April 23, 1904.

**The Shoshone or Wind River Act of March 3, 1905**

CHAP. 1452.—An act to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming and to make appropriations for carrying the same into effect.

Whereas James McLaughlin, United States Indian inspector, did on the twenty-first day of April, nineteen hundred and four, make and conclude an agreement with the Shoshone and Arapahoe Tribes of Indians belonging on the Shoshone or Wind River Reservation in the State of Wyoming, which said agreements is in words and figures as follows:

This agreement made and tneered into on the twenty-first day of April, nineteen hundred and four, by and between James McLaughlin, United States Indian inspector, on the part of the Unted States, and the Shoshone and Arapahoe Tribes of Indians belonging on the Shoshone or Wind River Indian Reservation, in the State of Wyoming, witnesseth: [1]

ARTICLE I. The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation, except the lands within and bounded by the following described lines: Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thenc in a southeasterly direction following the midchannel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the midchannel of the said Big Popo-Agie

[1] Wadsworth v. Boysen, 148 Fed., 771.



River in a southwesterly direction to the mouth of the North Fork of the said Big Popo-Agie River; thence up th emidchannel of said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said reservation, near the southwest corner of section twenty-one township two south, range one west; thence due west along the said southern boundary of the said reservation to the southwest corner of the same; thence north along the western boundary of said reservation to the place of beginning: *Provided*: That any individual Indian, a member of the Shoshone or Arapahoe Tribes, who has, under existing laws or treaty stipulations, selected a tract of land within the portion of said reservation hereby ceded, shall be entitled to have the same allotted and confirmed to him or her, and any Indian who has made or received an allotment of land within the ceded territory shall have the right to surrender such allotment and select other lands within the diminished reserve in lieu thereof at any time befoer the lands hereby ceded shall be open for entry.

ARTICLE II. In consideration of the lands ceded, granted, relinquished, and conveyed by Article I of this agreement, the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the homestead, town-site, coal, and mineral land laws, or by sale for cash as hereinafter provided at the following prices per acre: All lands entered under the homestead law within two years after the same shall be opened for entry shall be paid for at the rate of one dollar and fifty cents per acre; after the expiration of this period, two years, all lands entered under the homestead law, within three years therefrom, shall be paid for at the rate of one dollar and twenty-five cents per acre; that all homestead entrymen who shall make entry of the lands herein ceded, within two years after the opening of the same to entry, shall pay one dollar and fifty cents per acre for the land embraced in their entry, and for all of the said lands thereafter entered

under the homestead law, the sum of one dollar and twenty-five cents per acre shall be paid; payment in all cases to be made as follows: Fifty cents per acre at the time of making entry and twenty-five cents per acre each year thereafter until the price per acre hereinbefore provided shall have been fully paid; that lands entered under the town-site, coal, and mineral land laws shall be paid for in an amount and manner as provided by said laws; and in case any entrymen fails to make the payments herein provided for or any of them, within the time stated, all rights of the said entryman to the lands covered by his or her entry shall at once cease and any payments therebefore made shall be forfeited, and the entry shall be forfeited and canceled, unless the Secretary of the Interior shall in his discretion, and for good cause, excuse for not exceeding six months, the said failure, application for which must be made by the settler on or before the date of the payment which would bring him or her in default, and all lands except mineral and coal lands herein ceded, remaining undisposed of at the expiration of five years from the opening of said lands to entry, shall be sold to the highest bidder for cash at not less than one dollar per acre under rules and regulations to be prescribed by the Secretary of the Interior: *Provided,* That any lands remaining unsold eight years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price; that lands disposed of under the town-site, coal, and mineral land laws shall be paid for at the prices provided for by law, and the United States agrees to pay the said Indians the proceeds derived from the sails of said lands, and also to pay the said Indians the sum of one dollar and twenty-five cents per acre for sections sixteen and thirty-six, or an equivalent of two sections in each township of the ceded lands, the amounts so realized to be paid to and expended for said Indians in the manner hereinafter provided.[1]

[1] 25 Opp. Atty. Gen. 524.



ARTICLE III. It is further agreed that of the amount to be derived from the sale of said lands, as stipulated in Article II of this agreement, the sum of eighty-five thousand dollars shall be devoted to making a per capita payment to the said Indians of fifty dollars each in cash within sixty days after the opening of the ceded lands to settlement, or as soon thereafter as such sum shall be available, which per capita payment shall be from the proceeds of the sale of sections sixteen and thirty-six or an equivalent of two sections in each township within the ceded territory, and which sections are to be paid for by the United States at the rate of one dollar and twenty-five cents per acre: *And provided further,* That upon the completion of the said fifty dollars per capita payment, any balance remaining in the said fund of eighty-five thousand dollars, shall at once become available and shall be devoted to surveying, platting, making maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for irrigation of such lands shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

ARTICLE IV. It is further agreed that of the moneys derived from the sale of said lands the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, shall be expended under the direction of the Secretary of the Interior for the construction and extension of an irrigation system within the diminished reservation for the irrigation of the lands of said Indians: *Provided,* That in the employment of persons for the construction, enlargement, repair and management of such irrigation system, members of the said Shoshone and Arapahoe Tribes shall be employed wherever practicable.

ARTICLE. V. It is agreed that at least fifty thousand dollars of the moneys derived from the sale of the ceded lands shall be expended, under the direction of the Sec-

retary of the Interior, in the purchase of live stock for issue to said Indians, to be distributed as equally as possible among the men, women, and children of the Shoshone or Wind River Reservation.

ARTICLE. VI. It is further agreed that the sum of fifty thousand dollars of the moneys derived from the sales of said ceded lands shall be set aside as a school fund, the principal and interest on which at four per centum per annum shall be expanded under the direction of the Secretary of the Interior for the erection of school buildings and maintenance of schools on the diminished reservation, which schools shall be under the supervision and control of the Secretary of the Interior.

ARTICLE VII. It is further agreed that all the moneys received in payment for the lands hereby ceded and relinquished, not set aside as required for the various specific purposes and uses herein provided for, shall constitute a general welfare and improvement funds, the interest on which at four per centum per annum shall be annually expended under the direction of the Secretary of the Interior for the benefit of the said Indians; the same to be expended for such purposes and in the purchase of such articles as the Indians in council may decide upon and the Secretary of the Interior approve: *Provided, however,* that a reasonable amount of the principal of said fund may also be expended each year for the erection, repair, and maintenance of bridges needed on the reservation, in the subsistence of indigent and infirm persons belonging on the reservation, or for such other purposes for the comfort, benefit, improvement, or education of said Indians as the Indians in council may direct and the Secretary of the Interior approve. And it is further agreed that an accounting shall be made to said Indians in the month of July in each years until the lands are fully paid for, and the funds hereinbefore referred to shall, for the period of ten years after the opening of the lands herein ceded to settlement, be used in the manner and for the



purposes herein provided, and the future disposition of the balance of said funds remaining on hand shall then be the subject of further agreement between the United States and the said Indians.

ARTICLE VIII. It is further agreed that the proceeds derived from the sales of said lands in conformity with the provisions of this agreement, shall be paid into the Treasury of the United States and paid to the Indians belonging on the Shoshone or Wind River Reservation, or expended on their account only as provided in this agreement.

ARTICLE IX. It is understood that nothing in this agreement shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township or to dispose of said land except as provided herein, or to guarantee to find purchasers for said land or any portion thereof, it being the understanding that the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.

ARTICLE X. It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.

ARTICLE XI. This agreement shall take effect and be in force when signed by U.S. Indian Inspector James McLaughlin and by a majority of the male adult Indians parties hereto, and when accepted and ratified by the Congress of the United States.

In witness whereof the said James McLaughlin, U.S. Indian Inspector, on the part of the United States, and the male adult Indians belonging on the Shoshone or Wind

River Indian Reservation, Wyoming, have hereunto set their hands and seals at the Shoshone Agency, Wyoming, this twenty-first day of April, A.D. nineteen hundred and four.

JAMES MCLAUGHLIN, [SEAL.]
U.S. Indian Inspector.

| No. | Nafe | Age | Mark | Tribe |
|---|---|---|---|---|
| 1 | George Terry ..... | 48 | .. | Shoshone (Seal) |
| 2 | Myron Hunt ..... | 48 | x | " (Seal) |
| | (And 280 more Indian signatures.) | | | |

We, the undersigned, hereby certify that the foregoing agreement was fully explained by us in open counsil to the Indians of the Shoshone or Wind River Reservation. Wyoming; that it was fully understood by them before signing, and that the agreement was duly executed and signed by 282 of said Indians.

CHARLES LAHOE,
Shoshone Interpreter.

MICHAEL MANSON,
Arapahoe Interpreter.

SHOSHONE AGENCY, WYOMING,
April 22, 1904.

We, the undersigned, do hereby certify that we witnessed the signature of James McLaughlin, U.S. Indian Inspector, and of the two hundred and eighty-two (282) Indians of the Shoshone or Wind River Reservation, Wyoming, to the foregoing agreement.

JOHN ROBERTS,
Missionary of the Protestant Episcopal
Church on the Reservation.

JOHN S. CHURCHWARD,
Assistant Clerk, Shoshone Agency, Wyo.



SHOSHONE AGENCY, WYOMING,
April 22nd, 1904.

I hereby certify that the total number of male adult Indians, over eighteen (18) years of age, belonging on the Shoshone or Wind River Reservation, Wyoming, is four hundred and eighty-four (484) of whom two hundred and eighty–two (282) have signed the foregoing agreement.

H. E. WADSWORTH,
U.S. Indian Agent.

SHOSHONE AGENCY, WYOMING,
April 22nd, 1904.

Therefore

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the said agreement be, and the same is hereby, accepted, ratified, and confirmed, except as to Articles II, III, and IX, which are amended and modified as follows, and as amended and modified are accepted, ratified, and confirmed:

ARTICLE. II. In consideration of the lands ceded, granted, relinquished, and conveyed by Article I of this agreement, the United States stipulates and agrees to dispose of the same, as hereinafter provided, under the provisions of the homestead, town-site, coal and mineral land laws, or by the sale for cash, as hereinafter provided, at the following prices per acre: All lands entered under the homestead law within two years after the same shall be opened for entry shall be paid for at the rate of one dollar and fifty cents per acre; after the expiration of this period, two years, all lands entered under the homestead law within three years therefrom shall be paid for at the rate of one dollar and twenty-five cents per acre; that all homestead entrymen who shall make entry of the lands herein ceded within two years after the opening of the

same to entry shall pay one dollar and fifty cents per acre for the land embraced in their entry, and for all of the said lands thereafter entered under the homstead law the sum of one dollar and twenty-five cents per acre shall be paid; payment in all cases to be made as follows: Fifty cents per acre at the time of making entry and twenty-five cents per acre each year thereafter until the price per acre hereinbefore provided for shall have been fully paid; that lands entered under the town-site, coal and mineral land laws shall be paid for in an amount and manner as provided by said laws; and in case any entryman fails to make the payments herein provided for, or any of them, within the time stated, all rights of the said entryman to the lands covered by his or entry shall at once cease and any payments therebefore made shall be forfeited and the entry shall be held for cancellation and canceled, and all lands, except mineral and coal lands herein ceded, remaining undisposed of at the expiration of five years from the opening of said lands to entry shall be sold to the highest bidder for cash, at not less than one dollar per acre, under rules and regulations to be prescribed by the Secretary of the Interior: *And provided,* That nothing herein contained shall impair the rights under the lease to Asmus Boysen; but said lessee shall have for thirty days from the date of the approval of the surveys of said land a preferential right to locate, following the Government surveys, not to exceed six hundred and forty acres in the form of a square, of mineral or coal lands in said reservation; that said Boysen at the time of entry of such lands shall pay cash therefor at the rate of ten dollars per acre and surrender said lease and the same shall be canceled: *Provided further,* That any lands remaining unsold eight years after the said lands shall have been opened to enry may be sold to the highest bidder for cash without regard to the above minimum limit of price; that lands disposed of under the town-site, coal and mineral land laws shall be paid for at the prices provided by law, and the United



States agrees to pay the said Indians the proceeds derived from the sales of said lands, the amount so realized to be paid to and expended for said Indians in the manner hereinafter provided.

ARTICLE III. It is further agreed that of the amount to be derived from the sale of said lands, as stipulated in Article II of this agreement, the sum of eighty-five thousand dollars shall be devoted to making a per capital payment to the said Indians of fifty dollars each in cash within sixty days after the opening of the ceded lands to settlement, or as soon thereafter as such sum shall be available: *And, provided further,* That upon the completion of the said fifty dollars per capita payment any balance remaining in the said fund of eighty-five thousand dollars shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

ARTICLE IX. It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the lands herein described or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the understanding that the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.

SEC. 2. That the lands ceded to the United States under the said agreement shall be disposed of under the provisions of the homestead, town-site, coal and mineral land laws of the United States and shall be opened to settlement and entry by proclamation of the President of the United States on June fifteenth, nineteen hundred and

six, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, and enter said lands except as prescribed in said proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry, and the rights of honorably discharged Union soldiers and sailors of the late civil and of the Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States as amended by the act of March first, nineteen hundred and one, shall not be abridged.

All homestead entrymen who shall make entry of the lands herein ceded within two years after the opening of the same to entry shall pay one dollar and fifty cents per acre for the land embraced in their entry, and for all of the said lands thereafter entered under the homestead law the sum of one dollar and twenty-five cents per acre shall be paid, payment in all cases to be made as follows: Fifty cents per acre at the time of making entry and twenty-five cents per acre each year thereafter until the price pre acre hereinbefore provided shall have been fully paid. Upon all entries the usual fees and commissions shall be paid as provided for in homestead entries on lands the price of which is one dollar and twenty-five cents per acre. Lands entered under the town-site, coal, and mineral land laws shall be paid for in amount and manner as provided by said laws. Notice of location of all mineral entires shall be filed in the local land office of the district in which the lands covered by the location are situated, and unless entry and payment shall be made within three years from the date of location all rights thereunder shall cease; and in case any entryman fails to make the payments herein provided for, or any of them, within the time stated, all rights of the said entryman to the lands covered by his or her entry shall cease, and any payments therebefore made shall be forfeited, and



the entry shall be held for cancellation and canceled; that nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one of the Revised Statutes of the United States by paying for the land entered the price fixed herein; that all lands, except mineral and coal lands, herein ceded remaining undisposed of at the expiration of five years from the opening of said lands to entry shall be sold to the highest bidder for cash at not less than one dollar per acre under rules and regulations to be prescribed by the Secretary of the Interior: *Provided,* That any lands remaining unsold eight years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price.

SEC. 3. That there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of eighty-five thousand dollars to make the per capita payment provided in article three of the agreement herein ratified, the same to be reimbursed from the first money received from the sale of the lands herein ceded and relinquished. And the sum of thirty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the same to be reimbursed from the proceeds of the sale of said lands, for the survey and field and office examination of the unsurveyed portion of the ceded lands, and the survey and marking of the outboundaries of the diminished reservation, where the same is not a natural watre boundary; and the sum of twenty-five thousands dollars is hereby appropirated out of any money in the Treasury of the United States not otherwise appropriated, the same to be reimbursed from the proceeds of the sale of said lands, to be used in the construction and extension of an irrigation system on the diminished reserve, as provided in article four of the agreement.

Approved, March 3, 1905.

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## BRIEF FOR UINTAH COUNTY, UTAH, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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### INTEREST OF AMICUS CURIAE

The concern that prompts the filing of this Brief can be simply stated. Prior to the litigation of this reservation boundary issue, this Court, the United States and the Tribe itself had taken the position that the Ute Tribe's reservation consisted of 1 million acres, not the 4 million acres encompassed within the boundaries of the original Uncompahgre and original Uintah reservations. More than 18,000 residents of Duchesne County and Uintah County thus face the prospect of being suddenly thrust into the status of residents of an Indian reservation, where their officials would have only limited jurisdiction and where they would have no elective voice in the governance of their affairs and property by the Tribe. For its part, the Ute Tribe has enacted a comprehensive Tribal Code which, by its terms, is applicable to Indians and non-Indians alike throughout both historic reservation areas. *See, e.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Compared to *Solem v. Bartlett*, 465 U.S. 463 (1984), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Mattz v. Arnett*, 412 U.S. 481 (1973), or *Seymour v. Superintendent*, 368 U.S. 351 (1962), more people, more area and more resources are at stake here because of the conflicting decisions of the Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit.

In this respect, *Amicus* Uintah County is doubly impacted. The original boundaries of both reservations extend into Uintah County and encompass a substantial percentage of the entire county land base, not heretofore deemed to be within the boundaries of an Indian reservation.

## SUMMARY OF ARGUMENT

The Utah Supreme Court correctly concluded that the Uintah Act of May 27, 1902 (32 Stat. 245), Joint Appendix 159-160 (hereafter "JA") as amended, which provided that the unallotted lands of the Uintah Reservation be restored to the public domain, constituted clear evidence of disestablishment, as this Court has recognized. In a conflicting opinion, the *en banc* majority of the court of appeals mistakenly believed that this Court's decision in *Solem* dictated "a different result," despite the fact that in *Solem* the Court indicated that it was following a path clearly marked by its prior decisions. The fundamental error of the *en banc* majority centered around a misconstruction of *Solem* regarding the significance of the public domain terminology. Up front, *Solem* specially referenced public domain terminology in conjunction with other operative language that "strongly" suggested disestablishment and the *en banc* majority missed the point. *Solem* at 470, citing *Seymour* at 355 (restored to public domain language). Instead, the *en banc* majority focused on a footnote in that portion of the *Solem* opinion directed only to miscellaneous provisions in the balance of the *Solem* Act. *Solem* at 474-475. Even there, the *en banc* majority simply painted *Solem* with too broad a brush.

As a result, the *en banc* majority failed to take into account important factors uniformly understood to constitute explicit expressions of congressional intent to disestablish both the original Uintah and the original Uncompahgre Reservation. Moreover, the *en banc* majority ignored the unwavering position of the federal government since 1897 that the original Uncompahgre Reservation no longer exists. (The United States participating as *Amicus Curiae*, failed to inform the *en banc* court that the Uncompahgre documentation "compels" a conclusion that the reservation *was* disestablished, as the United States subsequently told this Court; instead, the United States simply took no position on this nearly identical *in pari materia* Act, and argued the other *in pari materia*



Act *was not* intended to disestablish the original Uintah reservation.) Accordingly, the *en banc* majority paid little attention to the similarly long-standing administrative and congressional treatment of the original Uintah Reservation. Relying on what it deemed the "*Solem* standards," it then fashioned the second largest Indian reservation in the United States.[1] In construing operative public domain language as it did, the *en banc* majority thus attempted to "remake history," which this Court admonished "cannot" be done in order to resurrect reservations that long ago ceased to exist. *DeCoteau*, 420 U.S. at 449; *Accord Rosebud*, 430 U.S. at 615. The Utah Supreme Court cannot be faulted for failing to follow this path.

In *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court has consistently recognized the importance of public domain language when presented with issues involving similar surplus land statutes also enacted pursuant to Sec. 5 of the General Allotment Act of 1887, 24 Stat. 388. The arguments of the United States in *Seymour*, *Mattz*, *DeCoteau*, and *Rosebud*, are all founded on this express understanding. The United States has consistently pointed out, by contrast, that disestablishment was clearly intended when the operative language of other statutes contained this express public domain terminology. In *Solem*, the United States did not repudiate or otherwise refute this fundamental point. Instead, the United States relied on a series of other more sophisticated arguments, none of which are controlling here.

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[1] The largest is the Navajo Reservation. *See* U.S. Department of Commerce, *Federal and State Indian Reservations* 63 (1974). With some three million acres of non-Indian owned lands included within its boundaries, the Uintah and Ouray Reservation, would under the *en banc* decision, contain the largest concentration of such lands of any recognized reservation. *See, e.g., Federal and State Indian Reservations, supra.*

## ARGUMENT

### I. A FAIR READING OF *SEYMOUR, MATTZ, DECOTEAU, ROSEBUD* AND *SOLEM* CLEARLY SUSTAINS THE VIEWS SET FORTH IN THE OPINION OF THE UTAH SUPREME COURT.

Over half a century after Congress expressly provided that the lands of the original Uintah Valley Reservation in Utah, not allotted to individual Tribal members or reserved for their benefit or other purpose, be "restored to the public domain," and after a substantial rural population (over ninety percent of which are non-members) has paid for, resided on and developed this area of the public domain (ninety percent of which is now held in fee), a challenge to the longstanding assumption of State jurisdiction in the area was mounted in *1975*. This belated effort to roll back history has resulted, after an additional eighteen years of Federal and State litigation, in the question of statutory construction now presented to this Court: whether Congress intended when making these lands a part of the public domain, to leave the area within the limits of the Reservation. *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072 (D. Ut. 1981). *Amicus* County is not unmindful of the longstanding rule that counsels how doubtful expressions in Indian legislation are resolved, but the intent and purpose of the *Ute* legislation was never in doubt and should not be in doubt now. Congress utilized public domain terminology in the operative language of the *Ute* legislation, and later amended but never repealed, directly or by implication, this language—language that this Court has repeatedly equated with the disestablishment of areas of original Indian Reservations in each of its modern cases. *Seymour* at 354-355; *Mattz* at 504, n.22; *DeCoteau* at 446; *Rosebud* at 589; *Solem* at 470.

On the floor of the House, Congressman Sutherland explained that because of the Ute legislation, an appropriation for another survey of the boundaries of the original Reservation would be "entirely useless." 36 Cong.



Rec. 1388 (1903), LD 90.[2] The *Rosebud* legislation was specifically cited, relied on, and adopted by Congress in finalizing the manner of entry. S. Rep. No. 4240, 58th Cong., 3d Sess. at 15-16 (1905) LD 102. At the time, Interior Inspector McLaughlin also explained the legislation to the Utes in open council in terms that everyone clearly understood ("Congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this Reservation"). Minutes of Councils with Uintah and White River Indians at 42 (1903) JX 162 (Duchesne Brief App. 368a).

Immediately after the Act was implemented, the Commissioner of Indian Affairs expressly stated that the Ute legislation "restored the area to the public domain". Annual Report of the Commissioner of Indian Affairs at 147 (1905), JX 323. In 1906, when President Roosevelt had occasion to revisit the issue one year after his 1905 Proclamation formally opening the Reservation (which recited the "public domain" language of the Ute legislation), he further described the area as the "*former*" Uintah Indian Reservation and one additional small tract theretofore reserved was similarly "*restored to the public domain*" in this 1906 Presidential Proclamation. Proclamation of September 1, 1906, 34 Stat. 3228-3229 LD 132. From the beginning, Congress shared this view and variously described the area, whenever the occasion arose, as "heretofore a part of the Reservation", 40 Cong. Rec. 1064, 1332 (1906) LD 116; S. Rep. 139, 59th Cong., 1st Sess. 1 (1906) LD 117; H.R. Rep. 291, 59th Cong., 1st Sess. 1 (1906) LD 119; Act of Jan. 27, 1906, 34 Stat. 9 LD 120, "formerly" a part of the Reservation, Act of July 20, 1912, 37 Stat. 196 LD 145,

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[2] The record on appeal includes a Joint Compendium of Legislative Documents and Joint Exhibits, which include Executive Orders, President Proclamations and certain Secretarial Orders, compiled and used by the District court. In addition to formal citation form, these sources are referred to parenthetically by their corresponding index numbers, LD 1 to LD 217, and JX 1 to JX 485. *See, Ute Indian Tribe*, 773 F.2d at 1094, n.2, and *Ute Indian Tribe*, 521 F. Supp. at 1080, n.17.

or within the "former" Reservation in so many instances that excerpts alone fill pages of Appendices. Duchesne Brief App. 408a. Administratively, there are references in every decade that the area in question was "restored to the public domain" and as such was within the "former boundaries" of the original Uintah Reservation, by various officials of the Department of Interior and Office of Indian Affairs. Joint Report by Special Inspectors to the Sec. of the Interior, contained in H.R. Doc. No. 892; 62d Cong., 2d Sess. 1-2 (1912) LD 146; Dept. of the Interior Memorandum from Finney to Howell at 1 (October, 1912) JX 359; Letter from Sec. of the Interior, contained in H.R. Doc. No. 1250, 63d Cong., 3d Sess. 2-3 (1914) LD 149; Letter from Commr. of Indian Affairs at 1, (June 19, 1941) JX 450; Opinion of Interior Solicitor, 59 I.D. 393 (1947) JX 454; Memo from Solicitor at 2 (Nov. 18, 1964) JX 469; Secretarial Order, 36 Fed. Reg. 19920 (1971) LD 210. As early as 1917, County boundaries were also defined with specific reference to the "boundary of the former Uintah Indian Reservation. Utah Code Ann. §§ 17-1-10, 17-1-27.

As recently as 1957, in the Court of Claims, the United States and the Uintah Indian Tribe formally stipulated that the "1902 Act, as amended" *restored the Uintah Reservation* to the "public domain" and that it was in fact a "former" Reservation. Stipulation at 10, 14, 15, *Uintah and White River Bands of the Ute Indians v. United States*, 139 Ct. Cl. 1 (1957), JX 455. (Counties Brief in Support of Petition App. 1a). And this concession was, as one would expect, consistent with other admissions of the Ute Indian Tribe that repeatedly recognized a Ute Reservation consisting of one million acres of trust lands, and not the four million acres within the original Reservation boundaries of their present claim. Even the United States, subsequent to the *en banc* decision of the Court of Appeals, now openly concedes that part of this Ute claim should not be sustained. Brief of the United States as *Amicus Curiae* at 20-21, *State of Utah v. Ute Indian Tribe*, U.S. Sup. Ct. No. 85-1821, *cert. denied*, 479 U.S. 994 (1986).



Even without a proper historical perspective or a review of the arguments previously presented and rejected, *a fair reading* of *Seymour, Mattz, DeCoteau, Rosebud*, and *Solem clearly sustains* the views set forth in the opinion in the Utah Supreme Court. However, as historians and other commentators are quick to point out, if the confusion and contradiction that seemingly runs through this area of the law is ever to be clarified, set straight, and properly focused, more is required here.[3] App. 1a-57a. Another three decades of litigation rehashing issues substantially settled for a century consistent with that historical understanding, benefits no one. Yet, as the *Amicus* Brief of the Navajo Nation attests, that is precisely what the future promises—unless this Court in this case authoritatively reconciles these conflicts consistent with the intent of Congress a century ago—a difficult task to be sure, but one made somewhat easier by the lessons learned since this Court was first presented with this issue in 1962. *Seymour, supra.* With this purpose in mind, *Amicus* County starts with a brief review of the primary arguments presented and rejected in each of these cases and the historic perspective available or established at the time.

Such a review establishes two essential points. First, as one would expect, each time the Court was subsequently presented with this issue more primary sources were available from which a proper historical perspective could be reconstructed and the intent of Congress more conclusively ascertained. Secondly, the United States be-

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[3] *See* Campbell, Reservations: *The Surplus Lands Act and the Question of Reservation Disestablishment*, 12 Am. Ind. L. Rev. 57 (1984); David R. Williams, *State v. Perank: Is the Uintah-Ouray Reservation "Nailed Down Upon the Border?"*, 1992 B.Y.U. L. Rev. 1247. Also, *see*, Herbert T. Hoover, *Congressional Intent Regarding Jurisdiction on Ceded Indian Land During the Allotment Era*; LeAnn Larson LaFave, *Congressional Intent Regarding Jurisdiction on Ceded Indian Land During the Allotment Era Part II: The Law*, Papers presented to the Western History Association, October 1986, reprinted in this App. 1a-57a.

cause of its inflexible "litigation position" in support of a recognition of the original Reservation boundaries in each case (disregarding the historical record, the intent of Congress and other legitimate governmental interests) has not made any positive contribution to the process. In fact, the shifting but very sophisticated arguments of the United States, in large part have served to perpetuate the confusion and conflicts in this area of Federal Indian law, making additional litigation even more certain. For this reason, the central arguments of the United States are specially tracked. The briefs of the United States in each of the first four cases are set forth verbatim in App. 58a-154a.

## II. THIS COURT HAS CONSISTENTLY RECOGNIZED THE SIGNIFICANCE OF PUBLIC DOMAIN TERMINOLOGY IN THE OPERATIVE LANGUAGE OF SIMILAR GENERAL ALLOTMENT ACT STATUTES AND THE UNITED STATES HAS CONSISTENTLY AGREED WITH THIS VIEW.

A. *Seymour v. Superintendent*, 368 U.S. 351 (1962). We start with *Seymour v. Superintendent, supra*, when this issue was first presented to this Court. Although we now know that the 1906 Colville Act at issue was one in a series of surplus land statutes enacted pursuant to the General Allotment Act of 1887 (Dawes Act), a routine matter for Congress by 1906, neither the General Allotment Act of 1887 nor the limited legislative history of the 1906 Act played any real role in the resolution of the question. The *Seymour* Opinion does not cite the General Allotment Act, Act of February 8, 1887, 24 Stat. 388, LD 13, or the legislative history of the 1906 Colville Act. The briefs are similarly silent with respect to the General Allotment Act and the few citations to the 1906 legislative history are set forth almost as an afterthought. In short, *Seymour* was decided *almost* without the benefit of any historical perspective—almost because while neither the General Allotment Act nor the legislative history of the specific Act in question played any role in the decision, Petitioner did rely on the contrast between the 1906 Act and earlier 1892 "public domain" legislation that concededly disestablished the North Half of the Colville Reservation. Brief for Petitioner at 10, *Seymour*. At best, this was a limited perspective but certainly one that benefited Petitioner by simple contrast. The fact that the public domain format of the 1892 Act was the result of a refusal by Congress to ratify a previously negotiated 1891 cession agreement because of the questionable nature of the title to the Colville Executive Order Reservation and a Congressional concern that undesirable precedent might be recognized, was not briefed or discussed. *Antoine v. Washington*, 420 U.S. 194, 213 (Rehnquist, J., dissenting); S. Rep. No. 664, 52d Cong., 1st Sess. (1892); *see also, U.S. v. Pelican*, 232 U.S. 442 (1914). Nor was it mentioned that the 1906 Act was actually preceded by another similar cession agreement. In any event, it is doubtful if any of the above would have altered the views of the United States, arguing in support of the Reservation boundaries of the South Half of the Colville Reservation ("Solicitor General has urged this construction upon the Court.") *Seymour* at 357.



The Solicitor General's three page argument was based almost entirely on the 1948 statutory definition of Indian Country, which, of course, begs the question and upon *subsequent* Congressional recognition, primarily in 1956, that the Reservation continued to exist. Memorandum for the United States, App. 59a-60a. Neither the General Allotment Act nor the historical perspective of the 1906 Act played any role in the brief for the United States. In this light, *Seymour* concluded, without further citation, that:

> The Act did no more than *open the way for non-Indian settlers* to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

*Seymour* at 356 (emphasis added).

The United States later seized on this statement from *Seymour* and tied it to the General Allotment Act of 1887 (which, as noted *supra*, was not even mentioned in

*Seymour*) in an attempt to attribute to both *Seymour* and the General Allotment Act a new Congressional plan or purpose consistent with a new argument that no surplus land statute passed pursuant to the General Allotment Act of 1887 was ever intended by Congress to disestablish portions of Indian Reservations.

The United States keyed on the General Allotment Act of 1887 for more than one reason. Prior to that time, Congress routinely utilized treaties, cession agreements and other similar arrangements, some of which contained allotment provisions, to disestablish reservations and open territories throughout the United States to settlement for decades:

> [t]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it . . . .

H.R. Rep. No. 791, 50th Cong., 1st Sess. at 3 (1888) LD 15. No one had ever attempted to even formulate an argument that Congress never intended these actions to disestablish the limits or boundaries of Indian reservations. If similar agreements, passed subsequent to 1887, were not intended to have the same effect, the General Allotment Act of 1887 was the only point in history that Congress could have even arguably intended to have altered such a fundamental historical process—at least in the absence of some affirmative persuasive evidence that Congress specifically intended to depart from that historical format, either generally or in a certain case. (The United States could not produce such evidence at that time—or, as a matter of fact, ever.)[4] The first opportunity for the United States to advance the new General Allotment Act argument in this Court came in *Mattz v. Arnett, supra.* Brief for the United States, App. 72a.

B. *Mattz v. Arnett*, 412 U.S. 481 (1973). Although the United States argued forcefully for the broad sweep

[4] There is no such evidence since most Congressmen from Western States intended the same results: reservation disestablishment.



of *Seymour* tied to the General Allotment Act in this respect, their position met with only limited success. Brief of the United States, App. 71a-72a. The history of the Klamath River Reservation at issue in *Mattz* was so tortuous and fact specific, isolated and atypical, that the *Mattz* dicta regarding the General Allotment Act, while all that the United States could have hoped for, did not really seem pivotal to the decision. Certainly, the United States repeatedly told the *Mattz* Court:

> The Act of 1892 can properly be understood only in light of the *General Allotment Act* which Congress had recently passed.
>
> In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the *General Allotment Act*. . . .
>
> *The policy of the Act* was to continue the reservation system and the trust status of Indian land. . . .
>
> Because of the *General Allotment Act* and these special Acts opening land within reservations to settlement, it is common today to have extensive non-Indian holdings within reservations. As we show in point III, *infra*, however, allotments to Indians and sales to non-Indians, whether under the *General Allotment Act* or special Acts, do not in themselves terminate the reservations. . . .
>
> This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, controlling here. . . .

Brief of the United States, App. 67a, 71a, 72a, 81a (emphasis added). *See also*, App. 68a, 72a, n.8.

And at oral argument, the United States squarely placed this issue "into a little bit of historical perspective":

> This same policy is recognized more recently by this Court in *Seymour v. Superintendent* and also has been codified by Congress in its definition of Indian country as including all the land within the boundaries of an Indian reservation whether patented or allotted or not.

Transcript of Oral Argument at 19, *Mattz*. *See also,* Oral Argument at 13, 14, 15, 20, 21.

At the same time, to shore up this new General Allotment Act argument and supplement this "little bit" of historical perspective for the Court, the United States also discussed certain statutes that concededly disestablished Indian reservations. According to the United States, the Court could then, by contrast, look to these examples in determining when Congressional action was really intended to disestablish an Indian reservation—an instant historical perspective of sorts. Brief of the United States, App. 75a. Following Petitioner's lead in *Seymour*, and especially in light of this aspect of the *Seymour* opinion, the controlling example cited by the United States of a Congressionally mandated disestablishment was the 1892 *Colville* statute, where the operative language restored the north half of the reservation to the public domain. As the United States told this Court in *Mattz*, among other things,

> This Court's more recent decision in *Seymour v. Superintendent,* 368 U.S. 351, is, in our view, controlling here. . . . In holding that the Act did not terminate the reservation there at issue, the Court emphasized the *absence* from the Act of language abolishing the reservations *or "restoring that land to the public domain"* (368 U.S. at 355).

Brief for the United States, App. 81a (emphasis added).

Other examples were also listed by the United States to support this "by contrast" argument. Brief for the United States, App. 75a.

At oral argument, the United States repeated the point:

> MR. SACHSE . . . In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation.

Transcript of Oral Argument at 20-21, *Mattz*.



Because the "absence of the public domain language" example, *supra*, figures prominently in the construction of the *Ute* legislation, this aspect of the "by contrast" argument also deserves special emphasis and further attention. For this reason, it is excerpted separately in the discussion and notes *infra*. For the most part, the other examples do not merit further discussion. The text *infra* establishes that they were representative of extreme and atypical situations encountered by Congress only on rare occasions and decades apart.

Without question, the *Mattz* opinion reflects both arguments. First, with respect to the General Allotment Act:

> Its policy was to continue the reservation system and the trust status of Indian lands, . . . . See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115-117, 127-129, 776-777 (1958) . . . .
>
> . . . This Court unanimously observed in an analogous setting in *Seymour, id.*, at 356.

*Mattz* at 496, 497.

Secondly, with respect to the "by contrast" argument (specifically including the "absence of public domain language" example of the United States), the Court in *Mattz* noted:

> More significantly, throughout the period from 1871-1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms.[22] . . .
>
> [22] Congress has used clear language of express termination when that result is desired. See, for example, *. . . 27 Stat. 63 (1892) adopted just two weeks after the 1892 Act with which this case is concerned, providing that the North Half of the Colville Indian Reservation (. . . be, and is hereby, vacated and restored to the public domain"),* and *Seymour v. Superintendent,* 368 U.S., at 354; 33 Stat. 218 (1904).

*Mattz* at 504, n.22 (emphasis added).

When this Court, a short two years later, was really presented with a typical surplus land statute specifically patterned and enacted pursuant to the terms of the General Allotment Act, with all of the supporting documentation of both the specific Act as well as the General Allotment Act, the General Allotment Act dicta in *Mattz* did not dissuade this Court, including the author of the *Mattz* opinion, from correctly concluding that surplus land statutes passed pursuant to the General Allotment Act were also intended and routinely passed by Congress to disestablish Indian reservations. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Predictably, the United States again argued forcefully in *DeCoteau* for a different result.

C. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). *In DeCoteau*, the surplus land statute at issue was one of eight similar agreements jointly ratified in an 1891 Appropriation Act, each of which was specifically tailored to the provisions in the General Allotment Act, which had just been passed after nearly a decade of focused debate. For these two reasons, fortuitous in retrospect, the historical record consisted of hundreds of pages directed to this aspect of the General Allotment Act (Section 5) and the affect the agreements were understood and intended to have. And for the first time, all of this primary documentation was excerpted and presented to the *DeCoteau* Court in several hundred pages of briefs, that set forth a complete and proper historical perspective.[5] That perspective established that while simple allot-

[5] For example, in 1892, the Commissioner of Indian Affairs confirmed:

> The policy of the Government, *rendered fixed and definite by the passage of the severalty law in 1887*, had for its object the twofold purpose of allotting lands in severalty, with the view of stimulating the individuality of the Indians and promoting their personal prosperity, *and also of rendering available for white settlement vast areas of surplus lands not needed by the Indians. Indian lands restored to the public domain and thrown open to white settlement* under the homestead law. . .

S. Rep. No. 57, 53d Cong., 1st Sess. at 2-5 (1893) (LD 26) (emphasis added).



ment per se (Section 6 of the General Allotment Act) was only intended to disestablish reservations at *some* point in the foreseeable future, a separate and distinct surplus land statute opening the reservation or a portion thereof to settlement pursuant to Sec. 5 of the General Allotment Act, was intended to disestablish the affected reservation *pro tanto* on the date of the opening set forth in the Presidential Proclamation, precisely in the same manner that pre-1887 enactments had disestablished reservations for decades, when Congress and/or the President authorized similar legislation.

The United States elected to ignore the force of this documentation and instead, urged the *DeCoteau* Court to recognize the continuing existence of the original reservation boundaries on the basis of *Seymour* and *Mattz* and the United States' revisionist theory of the General Allotment Act. While agreeing that the focal point of the issue had to be the General Allotment Act of 1887, the United States pressed the point that *Seymour* and *Mattz* were both openings pursuant to that Act, and that no Act pursuant to the General Allotment Act, according to the United States, was ever intended to effect reservation disestablishment except at some future point in time (again, as in the Brief for the United States in *Mattz*, blurring the distinction between allotment per se (Section 6 of the General Allotment Act) which eventually resulted in some non-Indian ownership within the limits of Indian reservations, but was never intended to immediately disestablish the reservations *and* surplus land statutes enacted pursuant to Sec. 5 of the General Allotment Act, which repeatedly accomplished this result.) The United States said:

> The 1891 Act did not specifically change the boundaries of the Reservation or return land to the public domain, and its repeated references to the *General Allotment Act* show that Congress intended no more than to "open" the Reservation for non-Indian settlement. This Court's decisions in *Seymour v. Superintendent*, 368 U.S. 351, and *Mattz v. Arnett*, 412

U.S. 481, show that this limited purpose is consistent only with preservation of the Reservation as a jurisdictional unit. . . .

. . . The Agreement, in its preamble, twice states that it is made under the authority of the *Act of February 8, 1887, the General Allotment Act,* and quotes from that Act. . . .

Several things are immediately apparent. The negotiation with the Indians, the allotments to them, and the cession made by them are expressly made under the authority of the *General Allotment Act.* The boundaries of the Reservation are not expressly altered and no separately described portion of the Reservation is vacated, returned to the public domain, . . . .

It was not the purpose of the *General Allotment Act* to divide reservations into a scattering of land under federal jurisdiction and a scattering under state jurisdiction. *Seymour v. Superintendent,* 368 U.S. 351, 357-358. Rather, as this Court stated in *Mattz, supra,* 412 U.S. at 497, quoting from *Seymour, supra*: . . . .

> In sum, while the *General Allotment Act of 1887* provided for some settlement of non-Indians within reservations, the congressional intent was to continue the reservation system . . .

Brief for United States, App. 92a, 94a, 95a, 96a.

At oral argument, the United States pressed the same points.

> MR. SACHSE: . . . And in this agreement and then in the Act of Congress that ratified it, there are numerous references to the *General Allotment Act.* . . .
>
> MR. SACHSE: . . . If this Court were to hold this reservation had been abolished by the 1891 Act, which I think would be a very restrictive and artificial interpretation of what the Court's done in *Mattz* and in *Seymour vs. Superintendent,* . . . .



Transcript of Oral Argument at 11, 21, *Erickson v. U.S. ex rel. Feather,* U.S. Sup. Ct. No. 73-1500, *decided with DeCoteau v. District County Court,* 420 U.S. 425 (1975). *See also* Oral Argument at 13, 17.

In addition, the United States submitted a series of very sophisticated arguments from little scraps of language in *Seymour* and *Mattz* to support this general proposition. No degree of sophistication could, however, overcome the problem the United States never addressed. Namely, all of the contemporary historical evidence undisputedly pointed to the opposite conclusion.

For example, even Senator Dawes himself made the point in the *DeCoteau* debate and the *DeCoteau* Court set forth his remarks at length:

> "The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the *surrender of a large portion of their reservations to the public domain.* In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. *All of this land is opened by this bill to settlement as part of the public domain* upon the payment by the settler . . ."
>
> Remarks of Sen. Dawes, *id.,* at 3879 (emphasis added). *DeCoteau* at 441.

Nor was there any doubt that Sec. 5 of the General Allotment Act was the linchpin of the entire process. The *DeCoteau* documents referred repeatedly to this aspect of the General Allotment Act. Brief for the Respondent at 72-113, *DeCoteau.* And the Court in *DeCoteau* specifically recounted this fact in the text of the *DeCoteau* opinion:

> *In 1887, the General Allotment Act (or Dawes Act)* was enacted in an attempt to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands.[10] The Act . . . *Against this background,* a series of negotiations took place in 1889 with the

objective of opening the Lake Traverse Reservation to settlement.

> . . . the Secretary of the Interior a set of draft instructions for the guidance of a Commission to negotiate with the Sisseton and Wahpeton Indians for the sale of their surplus lands.[13] *The instructions noted that the negotiations would be pursuant to § 5 of the General Allotment Act, . . .*

*DeCoteau* at 432, 434 (emphasis added). Also see *DeCoteau* at 436, 438, and 441.

In addition, the cession format utilized by Congress in previous decades (with the end result never questioned in terms of reservation boundaries), was only slightly modified at this point in time (1887 through the early 1900's). As a result, the United States could only argue that the cession format itself was probative of nothing because it was not within the list of self-serving "by contrast" examples the United States now said Congress utilized when Congress "clearly" intended to effectuate this result (the list noted *supra* was compiled by the United States and noted in *Mattz* at ~~497, n.19~~. In the original version of the list presented to the Court in *Mattz,* the United States had included representative cession language. Brief of the United States, App. ~~79a, n.18.~~ When that example did not appear in the *Mattz* opinion, the United States omitted any mention of this fact to the Court, simply adopted the *Mattz* list and then argued throughout *DeCoteau* that cession language was meaningless. Brief of the United States, App. 97a.

Even without a specific historical point of reference, it is difficult to believe that the *DeCoteau* Court would have found this argument credible when actually presented with a real cession Agreement. When all of the *DeCoteau* documents conclusively established that the *DeCoteau* cession format was still the rule at this point in time *i.e., after* the General Allotment Act, rather than the exception, this argument was soundly rejected. Cession terminology was "precisely suited" to disestablishment and



the remainder of the sophisticated arguments of the United States were noted and rejected for that reseason. *DeCoteau* at 445.

In addition to clearly rejecting the revisionist General Allotment Act argument of the United States, *DeCoteau* also sheds further light on the significance of public domain terminology. The United States continued to equate public domain terminology with reservation disestablishment, the foundation of the "by contrast" argument. In order to argue against disestablishment in *DeCoteau,* however, that support was qualified by insisting that the public domain terminology appear on the face of the Act (a particularly significant position in any event, in light of the face of the *Utah* legislation). In this fashion, the public domain argument was featured foremost in the brief for the United States:

> SUMMARY OF ARGUMENT . . . The 1891 Act did not specifically change the boundaries of the Reservation *or return land to the public domain,* . . . The boundaries of the Reservation are not expressly altered and no separately described portion of the Reservation is vacated, *returned to the public domain,* or set aside for settlement.
>
> THE ABSENCE OF LANGUAGE IN THE 1891 ACT EXPRESSLY ALTERING THE BOUNDARIES OF THE RESERVATION OR *RETURNING LAND TO THE PUBLIC DOMAIN* SHOWS THAT THE RESERVATION BOUNDARIES WERE NOT ALTERED
>
> In a footnote, the Court gave the following examples of termination language [*Mattz, supra,* 412 U.S. at 504, n. 22]:
>
> > 2. *27 Stat. 63 (1892) ( * * * the North Half of the Colville Indian Reservation "the same being a portion of the Colville Indian Reservation * * * be, and is hereby vacated and restored to the public domain").*

> There is no such language in the 1891 Act at issue here. The Reservation is not discontinued. A discrete portion of it is not "*vacated and restored to the public domain.*" The reservation lines are not abolished.
>
> First the "cession" is not an outright *return of the land* to the public domain . . .

Brief for the United States, App. 91a-92a, 95a, 97a, 98a (emphasis added).

In oral argument, the United States started off by attempting to make this modified argument, again using the 1892 *Colville,* "restore to the public domain" example to illustrate the point.

> MR. SACHSE: There is no such thing as was true with the north half of the Colville Reservation, where a particular part of the reservation was cut off and express language was used, saying that that has been removed from the reservation. You've heard some talk about the public domain. What's important in this Act is there is no language saying that this was returned to the public domain . . . .
>
> QUESTION: But, as a matter of fact, it's treated as the public domain.
>
> MR. SACHSE: I—I don't know what you mean by that.
>
> QUESTION: Well, what happened after the ceded property?
>
> MR. SACHSE: After the property was ceded,—
>
> QUESTION: Yes?
>
> MR. SACHSE: —the government sold that land under—
>
> QUESTION: Treated it like the public domain.
>
> MR. SACHSE: Well, only in the exact same sense that it—
>
> QUESTION: Well, it was handled as part of the public domain by the same system that the public domain was handled.



> QUESTION: Weren't they acting for the Indians?
>
> MR. SACHSE: That is to say—and I'll try to get this in the—I think I may do better to break it down into historical perspective.

Transcript of Oral Argument at 11-12, *Feather.*

The historical perspective the United States then relied on was a quick reference to the "actual dynamics" of *Seymour* and *Mattz.* As *DeCoteau* attests, this historical perspective was clearly not persuasive.

The *DeCoteau* Opinion frames the issue in terms of whether the Lake Traverse Reservation was disestablished "and returned to the public domain" by the 1891 Act. *DeCoteau* at 426-427. Respondent's question presented included similar phraseology ("disestablished said reservation and restored the lands to the public domain"). Brief for Respondent at 2, *DeCoteau.* References to the public domain concept appear throughout the *DeCoteau* documents and the opinion of the Court significantly sets forth representative excerpts in extended quotations (i.e. the "surrender of a large portion of their reservations to the public domain" and the "All this land is opened by this bill to settlement as part of the public domain." remarks of Senator Dawes, *DeCoteau* at 425).

In addition, there is no question that the Court in *DeCoteau* relied on the statements of the sponsors as well as the "public domain by contrast" example previously advanced by the United States in *Mattz.*

> That the lands ceded in the other agreements were *returned to the public domain,* stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. *The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the "public domain."* See *supra,* at 440-441. Cf. *Mattz v. Arnett,* 412 U.S., at 504 n.22 [Listing 1892 *Colville* "public domain" statute.]
>
> In *Seymour,* the Court *sharply contrasted* the 1906 Act, which provided only for non-Indian settlement,

> with an 1892 Act, which plainly " 'vacated' " and *restored " 'to the public domain' "* the northern portion of the Colville Reservation. *Seymour v. Superintendent,* 368 U.S., at 355. *The 1891 Act before us here is analogous to that 1892 statute.*

*DeCoteau* at 446, 448-449 (emphasis added).

In this respect, the United States did contribute something to the process. *DeCoteau* confirms and makes clear that the public domain concept, whether expressed on the face of the act or in the legislative history and surrounding circumstances, should be equated with reservation disestablishment. The *Ute* legislation qualifies in both respects.

D. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977). Subsequent to *DeCoteau,* the United States resisted the force of the decision as if *DeCoteau* had never been decided. In 1977, when this Court was presented in *Rosebud Sioux Tribe v. Kneip,* with three additional Sec. 5 surplus land statutes considered by Congress a decade after the *DeCoteau* surplus land statutes were passed, the United States again argued that after adopting the General Allotment Act, Congress never intended this type of statute to disestablish portions of Indian reservations. As in the past, reliance for this argument was placed almost entirely upon *Seymour* and *Mattz* as discussed *supra.* In the brief, the United States specially emphasized that *Mattz* noted:

> Placing the 1892 Act into the historic context of the *General Allotment Act of 1887,* 24 Stat. 388, the [*Mattz*] Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system* . . .

Brief for the United States, App. 122a (emphasis in original text).

In the discussion of *DeCoteau,* the United States never even mentioned the role played by Sec. 5 of the General



Allotment Act in the *DeCoteau* process. Brief for the United States, App. 122a. According to the United States, *DeCoteau* was important primarily because of the differences between the Act there and the *Rosebud* legislation. Namely, the unilateral nature of the Congressional action in *Rosebud* and the uncertain payment in trust for the *Rosebud* land.

At oral argument, the United States repeatedly stressed the revisionist theory of the General Allotment Act. *DeCoteau* was mentioned only in passing and then only to somehow support continued reservation boundaries throughout this period. Transcript of Oral Argument at 20, 21, 27, 29, *Rosebud.*

The *Rosebud* Court, again including the author of the *Mattz* opinion, rejected the arguments of the United States. And at the outset, the Court set forth the underlying section of the *Rosebud* legislation that controlled the process, which incorporated "verbatim" Sec. 5 of the General Allotment Act of 1887:

> § 12, 25 Stat. 892, . . .
>
> *This reproduced, verbatim the language of the General Allotment Act, § 5, Act of Feb. 8, 1887, 24 Stat. 389.*

*Rosebud* at 589, 590 (emphasis added).

Next, the Court made specific reference to the "familiar forces" noted in *DeCoteau* and the provisions of a 1901 Act that generally authorized the Secretary of the Interior to also set the process in motion. *Rosebud* at 590.

Then, the *Rosebud* Court proceeded, in the most definitive Opinion to date, to squarely address each and every argument, sophisticated arguments to be sure (and there were many), advanced in support of a Court restoring the original boundaries of the Rosebud Reservation. Although one or two minor exceptions might exist, a careful reading of *Rosebud,* together with *DeCoteau* as historical background, establishes that the United States, the Petitioner and supporting *Amici,* have not advanced any arguments of substance since that have not already been

answered there. The Utah Supreme Court was on solid ground when it still looked to and relied on *Rosebud* for guidance in resolving similar questions involving the Ute legislation.

In light of the persistence of the United States with respect to Sec. 5 of the General Allotment Act, the position of the United States regarding the "by contrast" argument and the public domain example was similarly predictable. As in *DeCoteau,* the United States in *Rosebud* continued to equate public domain terminology with disestablishment, the foundation of the "by contrast" argument. In order to argue against disestablishment, in *Rosebud,* however, that support was even more qualified than in *DeCoteau.* Not only did the United States continue to insist that the public domain terminology appear on the face of the Act, but other arguments were also advanced to explain why Congress never technically restored the lands to the public domain even if Congressional documents repeatedly stated that this was the effect of the legislation. In this fashion, the public domain argument still featured prominently in the Brief for the United States.

> In the Act of March 2, 1889, Congress *'restored to the public domain'* (25 Stat. 896) one-half of the Great Sioux Reservation . . .
>
> The Acts of 1904, 1907, and 1910, do *not* demonstrate an intention to *return lands to the public domain,* and *the clear language of other Acts expressly restoring lands to the public domain is notably absent.*
>
> In 1892, the United States expressly vacated and *restored a portion of the Reservation 'to the public domain,'* 27 Stat. 62, 63.
>
> These distinctions led to the conclusion that the Lake Traverse Reservation was extinguished and the land *restored to the public domain. . . .*
>
> . . . this, the Court held, *restored the land to the public domain and extinguished the Reservation.* 420 U.S. at 446-447. But under the Rosebud Acts, the



> federal government did not buy the Indians' land. The government acted merely as a trustee for the Tribe in selling its land to non-Indians; the land passed from the Indians to private individuals. It was *not first made part of the public domain, . . .*
>
> This is particularly true when, as here, *Congress* demonstrated quite clearly that it did *not intend to place the Indian lands within the public domain.*
>
> The language of the Acts themselves does not *disclose an intent to return land to the public domain. . . .*
>
> The 1904 Act nowhere provides that the Reservation was abolished or *that the lands were to be restored to the public domain. . . .*
>
> Again no mention is made that the Reservation is *pro tanto* terminated or that the lands were to become public lands.
>
> This reticence is in *marked contrast* to the *express language used by Congress in other statutes. . . .* 27 Stat. 63 (1892) ("the same being a portion of the Colville Indian Reservations * * * be, and is hereby, vacated and *restored to the public domain; . . .* See also *Mattz v. Arnett, supra,* 412 U.S. at 504, n.22.[12]

Brief for the United States, App. 113a, 118a, 120a, 123a, 125a, 126a. *See also* App. 128a, n.15, 130a, 137a (emphasis added).

Reference to the public domain concept also appears throughout the *Rosebud* documents. As the *Rosebud* Court noted at the beginning of the opinion, the very act that created the Rosebud Reservation, the 1889 Great Sioux Act, contained public domain terminology. *Rosebud* at 589.

Moreover, Congress most explicitly and repeatedly referred to public domain when implementing the state school land Grant. The *Rosebud* opinion specifically noted one representative passage where the Senate sponsor

described the process and it was set forth at length. 35 Cong. Rec. 1423 (1904); *Rosebud* at 600, n.21.

As in *DeCoteau*, the public domain concept, whether expressed on the face of the act or in the legislative history, was important in *Rosebud* and equated with reservation disestablishment.[6]

Additionally, *Rosebud* stressed that in each instance, the underlying premise was that "congressional intent" will control. *Rosebud* at 586. *Rosebud* also recognized *Seymour* and *Mattz* to simply stand for the proposition that the mere fact that a reservation had been opened to settlement would "not necessarily mean" that the opened area had lost its reservation status. *Rosebud* at 586-587. More importantly, *Rosebud* reaffirmed that *DeCoteau* established that reservation status could not survive in the face of a "congressionally manifested intent to the contrary." *Rosebud* at 587. While *DeCoteau* also specifically established that surplus land statutes enacted pursuant to Sec. 5 of the General Allotment Act were, after 1887, intended by Congress to accomplish that result (*DeCoteau*), *Rosebud* made clear that Congress never intended to alter that fundamental understanding when, pursuant to Sec. 5 of the General Allotment Act in the *Rosebud* legislation noted *supra*, Congress continued to enact *similar* legislation throughout the first decade of the twentieth century. Although Congress altered the manner of direct payment in the early 1900's and relied on its plenary power in Indian affairs, affirmed by this Court in 1903 in *Lone Wolf v. Hitchcock*, 187 U.S. 553

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[6] With respect to public domain, the brief of *Amicus Ute Indian Tribe*, at 16, n.20, quotes *Rosebud* in the following manner:

> . . . this Court's counsel that 'the question of whether lands are in the public domain is separate from the question of intent to disestablish.' *See, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604 n.27 (1977).

The *Rosebud* note 27 in United States Reports states:

> . . . the question of whether lands became public lands is separate from the question of intent to disestablish. . .

*Rosebud* at 604, n.27.



(1903), as the *Rosebud* Court explained at length, neither of these changes altered that fundamental Congressional understanding. *Rosebud* at 598-599, n.20.

With respect to the changed method of payment (payment from the homesteader to the United States in trust for the tribe rather than from the United States directly to the tribe in trust), the *Rosebud* Court correctly found "no indication that Congress intended to change anything other than the form of, and responsibility for, payment." Earlier, the Court had cited with approval the Court of Appeals' view:

> As the Court of Appeals noted, and as all parties appear to agree, "[t]he problem in the Congress was not jurisdiction, title, or boundaries. It was, simply put, money." 521 F.2d 87, 94.

*Rosebud* at 591, n.10.

With respect to the unilateral nature of the Congressional enactment, the Court set forth the relevant passage of *Lone Wolf*, specifically relied on by Congress at the time. *Rosebud* at 594.

Moreover, one should have expected that these changes would, over time, result in a new format for the Sec. 5 surplus land statutes. And this was in fact the case. But importantly, as *Rosebud* also establishes, the changes were not intended by Congress to alter the fundamental policy of disestablishment, then in effect for nearly two decades. With consent no longer Congressionally required, Sec. 5 surplus land statutes in this cession format (1887-1905) were soon modified. *Rosebud* at 598. After that, the format was utilized only when consent was readily obtainable in council and then only to evidence an informal understanding. *Rosebud* at 607, 612. Thereafter, by 1907, a new format was routinely adopted where, as *Rosebud* also attests, the Secretary of the Interior was authorized to "sell and dispose of a portion of the reservation" (arguably strong language in perspective), with the balance of the provisions of each act modified to meet whatever the situation then required. *Rosebud* at 608.

The changes in the legislative format therefore reflect no change in Congressional intent. As the *Rosebud* opinion and the *Rosebud* documents attest, this is not merely an arguable point, but an historically documented fact. To be sure, these changes altered some aspects of the nature of the discussion and the transaction. But it mattered little that the 1904 *Rosebud* Act was technically not a "cession." As the Court in *Rosebud* explained:

> As a matter of strict English usage, petitioner is undoubtedly correct; "cession" refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign. But as Mr. Justice Holmes commented, we are not free to say to Congress: "We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States,* 163 F. 30, 32 (CA1 1908). . . .
>
> The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the meaning of the Act ambiguous . . .
>
> The word is technically misused but the meaning is quite clear.

*Rosebud* at 597.

And it mattered little that payment in trust, rather than directly from the United States, would create a lingering beneficial interest in the opened lands until settled on or otherwise disposed of, such as that recognized in *Ash Sheep Co. v. United States,* 252 U.S. 159 (1920). For, as the *Rosebud* Court correctly affirmed:

> This preceding status could exist even if the lands were disestablished from a reservation. *United States v. Pelican,* 232 U.S. 442, 449 (1914); cf. *Ash Sheep Co. v. United States,* 252 U.S. 159, 166 (1920). As recognized by the Court of Appeals, "the fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape,



> and boundaries." 521 F. 2d, at 102. The question of whether lands become "public lands" under *Hitchcock* and *Ash Sheep,* is therefore, logically separate from a question of disestablishment. *United States v. Pelican, supra.* As the issue is not before us, we need not decide whether or not the lands became "public lands."

*Rosebud* at 601, n.24.[7]

In the final analysis, *Rosebud* establishes that the Sec. 5 Surplus Land Statutes, even as subsequently modified in *Rosebud,* were intended by Congress to disestablish reservations. Contrary to the repeated submissions of the United States, supported only by citations to *Seymour* and *Mattz* and other undocumented arguments, Congress never intended either the General Allotment Act or the subsequent changes in format to alter this fundamental concept of the entire process. In the absence of some statute, Senate report or House report, or other conclusive evidence of such a congressional purpose, which has never surfaced to date, this *Rosebud* perspective is the one that should be controlling here. The Ute legislation parallels the *Rosebud* legislation in both time and substance. Nothing in the opinion of this Court in *Solem v. Bartlett, supra,* in which a subsequent statute was construed, was intended to detract from that established historical perspective.

E. *Solem v. Bartlett,* 465 U.S. 463 (1984). In *Solem,* the United States combined and restated so many variations of both of these arguments that even a summary

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[7] Indeed, this lingering beneficial interest was undoubtedly "logically separate" from the question of disestablishment. The underlying facts in *Ash Sheep* subsequently established that the act at issue in *Ash Sheep* which created the lingering beneficial interest there, for reasons peculiar to the location of the Crow Reservation, described new diminished reservation boundaries and specifically delineated and separated the "ceded area" with the lingering beneficial interests, from the contiguous block of unceded land, designated "the diminished Crow reservation." *Little Light v. Crist,* 649 F.2d 682 (9th Cir. 1981); *Montana v. Crow Tribe,* 819 F.2d 895 (9th Cir. 1985), *summarily aff'd* 484 997 (1988).

review is difficult to present in context. Moreover, since the United States did not participate in oral argument, that abbreviated source is simply not available. In short, it can fairly be stated that the United States argued whatever was necessary to resist reservation disestablishment once again in *Solem*. Although inaccurate and half-true in many respects, according to the United States, these arguments made clear that some surplus land statutes passed pursuant to the General Allotment Act were intended by Congress to disestablish portions of Indian reservations (a significant concession) and others, even if so intended, should not be so construed by the Court at this point in time, unless the subsequent settlement of the area was pervasive. *Solem* essentially reflects the same sentiment.

Beyond that, *Solem* is also important here because of the one very significant aspect of the public domain argument specifically set forth in *Solem* that the United States, Petitioner and supporting *Amici,* consistently avoid or otherwise ignore. In conclusion, it bears repeating, especially in the context of this brief.

The fundamental error of the *en banc* majority centered around a misconstruction of *Solem* regarding the significance of the public domain terminology. Up front, *Solem* specially referenced public domain terminology in conjunction with other operative language that strongly suggested disestablishment and the *en banc* majority missed the point. *Solem* at 470, citing *Seymour* at 355 (restored to public domain language). Instead, the *en banc* majority focused on a footnote in that portion of the *Solem* opinion directed only to miscellaneous provisions in the balance of the *Solem* Act. *Solem* at 474-475. Even there, the *en banc* majority simply painted *Solem* with too broad a brush.

## CONCLUSION

The judgment of the Utah Supreme Court should be affirmed.



Respectfully submitted,

JOANN B. STRINGHAM
Deputy Uintah County Attorney
152 East 100 North
Vernal, UT 84078
(801) 781-0770

TOM D. TOBIN
*Counsel of Record*
KENN A. PUGH
TOBIN LAW OFFICES, P.C.
P.O. Box 730
422 Main St.
Winner, SD 57580
(605) 842-2500

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# APPENDIX

**APPENDIX**

# CONGRESSIONAL INTENT REGARDING JURISDICTION ON CEDED INDIAN LAND DURING THE ALLOTMENT ERA: HISTORY

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Conflict regarding the prerogatives of tribal governments on Indian reservations has escalated steadily in recent years. Some resident tribal enrollees have complained to outsiders. "THE U.S. CONSTITUTION STOPS HERE," was the headline of a series about Red Lake Reservation in the *Minneapolis Star and Tribune.*[1] Indian courts were "islands of injustice," wrote investigative reporters. Reservation residents were not represented by qualified counsel. Ill-trained judges ordered, and self-serving politicans enforced, penalties for alleged infractions to satisfy personal interests. Their Red Lake constituents were either driven into exile out of fear, or stripped of opportunities and possessions, "with almost nowhere to turn" for help.

The problem was not restricted to Ojibway Country, the reporters added. On 487 reservations scattered across the country, many Indians were threatened by the loss of justice due them as citizens of the United States without recourse, and most reservation residents were deprived of economic opportunities because "businesses . . . important to the well-being of reservation economies" were "scared away by unjust and incompetent tribal courts." "Federal judges refuse[d] to hear appeals." "Congress . . . failed to pass laws curbing abuses," even though it held constitutional "authority over Indian tribes," and the Bureau of Indian Affairs had "powerful leverage" to enforce federal laws with "the $1.4 billion it dispenses annually for tribal governments."

As they championed the rights of Indians who lived under the jurisdiction of tribal governments, the Minneapolitans were left with the embarrassing conclusion that reservation leaders were not competent to govern without federal supervision. Their escape from the charge of racism was a ploy used often by outside observers who breeze through Indian Country. To blame were not self-

[1] January 4-7, 1986.



serving tribal politicans, after all, but "the long history of white men's exploitation of Indians."

Cultural self-condemnation did not assuage the resentment of Oglala Sioux journalist Tim Giago. From his *Lakota Times* office at Pine Ridge, he wrote not only in defense of the chief judicial officer at Red Lake, but also in protest against non-Indian journalists who passed judgment on reservation societies. Using news releases about Wounded Knee-1973 and Red Lake-1986 as prime examples, he accused uninformed Whites of calling Indians incompetent without justification, failing to give the victims of journalistic condemnation a chance to respond, and reaching erroneous conclusions that impaired the opportunities of all tribal members. "It is patently wrong for white reporters to overlook the ancient customs and laws of the much older tribal governments" when appraising the applications of justice, wrote Giago. And he challenged the authority of the United States to intrude, contending that its Constitution was "not the law of the land on the sovereign Indian nations."

At the end, Giago employed a tactic used often by Indians to escape the charge of racial bias for the blanket condemnation of White people. To blame for problems on the reservations was not abuse by non-Indians in general, but erroneous judgments by White historians in particular, who persist in teaching that Indians were "uncivilized savages when the white man first arrived." [2]

More troublesome still than conflict about the affects of tribal governance on Indians has been distress regarding judicial sanction for tribal jurisdiction over White people who live within the original boundaries of Indian reservations. While weighing arguments about the civil authority of Indians submitted by tribal lawyers and federal spokesmen against counter arguments advanced by counsel for state or local governments, federal judges have ruled indecisively on one side, then on the other.

[2] Sioux Falls *Argus Leader*, March 30, 1986.

Non-Indians have felt betrayed by attacks against state and local authority that has worked for them through several generations. They have complained that tribal governance might deprive them of time-honored constitutional guarantees. (See Appendix A) Indian leaders have asked why White people, who have managed their affairs for so long in the past, could not live under tribal authority in years to come.

Consternation escalates partly because of legal implications, and more due to inevitable economic consequences. At issue in Sioux Country during the summer of 1986 were tribal ordinances designed to ease Indian unemployment in excess of eighty percent on reservations with the preferential hiring of tribal enrollees on federal road projects, which have been accomplished mainly by Whites in the past. South Dakota Governor William Janklow took exception with a challenge to the legality of a special tax to fund the training of prospective Indian road workers.[3] At issue in the summer of 1986, too, was whether Pine Ridge Reservation residents should purchase Oglala tribal or South Dakota state license plates for their automobiles; and whether federal, state or tribal jurisdiction should prevail in the regulation of tribally operated bingo halls, which have been under investigation for possible corruption by crime syndicates.[4] In these instances, increasing intercultural antagonism between the families of persons seeking jobs, on the one hand, and friction between state and tribal officials in search of revenues, on the other hand, will be inevitable results.

Because tribal jurisdiction has so many potential applications of practical and economic consequence, no federal action to restrict or expand it will satisfy both tribal members and White people. At the grass roots, they are ever at odds, and express divergent opinions regarding how the conflict should be resolved. Most non-Indians

[3] Sioux Falls *Argus Leader*, July 22, 1986.

[4] Sioux Falls *Argus Leader*, July 27, September 16, 1986.



and some relocated mixed-bloods believe that tribal government if not the entire reservation system ought to be abolished. Nearly all Indians who occupy allotments or derive noteworthy benefits from reservation affiliations contend that reservation life under tribal authority is essential to cultural survival, but they disagree about the prerogatives tribal leaders ought to retain. A Yankton Sioux of Rapid City, who served more than three decades in the U.S. Indian Field Service, thinks tribal authority should be restricted to the management of Indian land.[5] Another Yankton, who devotes his life to the study of tribal history, has a different opinion. The subordination of tribal to White governance across Indian Country has been unjust all along. Within reservation boundaries, tribal leaders should govern without any constraint except the obligation to honor the presence of Whites. As national ctizens, they should be at liberty to live and own property within reservation boundaries. But those who cannot adjust to tribal regulations should be encouraged to relocate (possibly with assistance from voluntary relocation and employment assistance programs at federal expense), and all who resist the authority of tribal officials openly should be removed.[6]

Controversy in dialogue has led to action by officials, which has further aggravated and perplexed the victims of the dispute. Many adversaries have reached agreement in the belief that a definitive answer which factors either Indians or Whites would be better than the continued escalation of the controversy. Already, at least one tribal policeman has resigned because "nobody could tell him where on the reservation he could arrest suspects and enforce Indian laws."[7] White and Indian reservation

[5] Personal interview with Harold Shunk by the writer in Pierre, June, 1986.

[6] Personal interview with Leonard Bruguier by the writer at Vermillion, August, 1986.

[7] Personal interview by the writer with former policeman who prefers anonymity, July, 1985.

residents have grown increasingly suspicious of each other through debates about theoretical questions they barely understand, and practical issues that affect them directly. Federal judges have floundered in the contents of briefs and testimonies containing incomplete or faulty informamation. Attorneys have grown antagonistic about the erratic behavior of the courts, and increasingly intolerant of the performance of researchers who have worked as consultants on jurisdictional cases, with some justification. All public historians have not called Indians "uncivilized savages," as Giago has charged, but some have done jurisdictional research in violation of standards that govern their profession. Out of indolence, incompetence, or commitment to social causes, all too many historical consultants have skirted the grueling pursuit of truth in contexts and data to fashion selective information into polemical instruments for use in a righteous effort to make up for past inequities.

One historical consultant who supplied information for jurisdictional litigation pertaining to a Sioux reservation either stumbled into files that supported his sense of fair play, or gathered evidence selectively by design, and permitted its use to demonstrate congressional intent to sustain tribal authority within original reservation boundaries, even though the weight of evidence should have revealed the opposite was true. He either lacked competence, or abandoned the pursuit of truth for the role of referee on retribution as an advocate of one adversary in the judicial process. By doing so, the consultant confounded the proceedings of justice all the way to the Supreme Court of the United States.[8]

The decision in that case has muddled subsequent efforts to answer the central question in every jurisdictional investigation. It is this. Thruough the era between the passing of the Dawes Act in 1887 and its termination by the Indian Reorganization Act in 1934,

[8] *Solem v. Bartlett.*



did Congress mean to leave intact federal and tribal jurisdictional authority, or did it intend to disestablish the affected portion of the reservation? Because congressmen of that era left no cogent statements, historical consultants have presented selective passages from legislative and administrative records that pertain to intent. Attorneys have tourtured phrases here, and marshalled implications there, to support divergent postures toward how congressmen should have responded eighty or ninety years ago. Judges have listened to their arguments, mulled over conflicting precedents, reviewed legislative and administrative histories, even taken Indian-White population ratios into account, and from appearances relied excessively upon their own social values when reaching decisions.

From their inconsistent rulings has evolved intolerable confusion. How much better it would be to search for congressional intent in evidence regarding the behavior of administrative officials as they worked with congressional support and allocations on the management of Indian affairs while the Dawes Act was in effect. Using publications and documents that deal with the application as well as the formulation of federal policies, historians with impartial disposition should be able to extrapolate intent with limited margin of error.

In every case, they should review three things: (1) as background, JURISDICTIONAL POLICY FOR INDIANS from colonial times to the late nineteenth century, before many of the tribes moved onto reserves and accepted allotment and surplus land sales according to the terms of the Allotment Act of 1887; (2) the GENERAL PLAN OF FEDERAL INDIAN POLICY through the period 1887 to 1934, before the Dawes Act ceased to function; and (3) the AFFECT OF FEDERAL POLICY upon governance within reservation boundaries, where Indian Field Service officials managed agency affairs with congressional support.

Extraordinary developments in the histories of some tribes may lead to unique judicial decisions. But political

affairs on nearly all reservations evolved according to the same general plan. A historian who has kept up with the literature on federal policy toward Indians, and has labored in the records of a major federation of tribes for long, can present a scenario for the typical tribe that had a typical relationship with Congress through the era when the Dawes Act was in effect.

That historian should find it easy to trace JURISDICTIONAL POLICY FOR INDIANS down to the passing of the Dawes Act.[9] Sources at had reveal that general suppositions about the sovereign authority of Indian leaders to govern have been fairly consistent since the formulation of policy for this issue soon after the founding of Jamestown in 1607.

*Jurisdictional Policy Prior to the Dawes Act*

Throughout the colonial era, Anglo-American officials looked upon groups of Indians as political entities with title to land, which could be "quieted" only by purchase or conquest in war. Few White colonials proposed to ignore aboriginal claims or exterminate tribes as means of territorial acquisition. Like officials in England, they thought of areas occupied by Indians as the rightful possessions of their tribes; accepted the borders of Indian Country as boundaries within which Indian leaders exercized jurisdiction over tribal and diplomatic affairs; and negotiated often with tribal spokesmen by procedures in use for international deliberations between sovereigns of Europe. Similarly, Indian representatives dealt with Whites as they had with neighboring tribes through formal discussions in preference to war. The process of treaty making evolved almost naturally.

White diplomats were more aggressive than tribal spokesmen, for several reasons. There was a supposition

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[9] Francis Paul Prucha's *the Great Father* (Two Vols.; Lincoln: University of Nebraska Press, 1984) supplies the best general coverage of Indian policy from colonial times to 1980.



about universal rights to land in short supply explained by the European philosopher Emmerich de Vattel. He argued that sedentary, agricultural life was superior to diversified, semi-nomadic existence, assumed that "the earth belongs to all mankind" as a "common dwelling-place and source of subsistence," and contended that no component of mankind should appropriate more land than it could use if other parts were in need of space.[10]

Secondly, there was the belief shared by colonials regarding New World "discovery." A European sovereign whose agent staked first claim to a tract had the right of preemption over other European monarchs in competition for Western Hemispheric empire. It could be exercised as quickly and extensively as tribes relinquished claim by treaty, or lost it in war.

In addition, there was an assumption that sovereignty was divisible, and in the process of its reduction English monarchs had from might or other right acquired the greatest measure. Especially through divine ordination, they assumed dominion of supreme magnitude for themselves, and recognized sovereignty of second order in tribal governments.[11] To these inducements was added aggressive motivation from colonial assumptions about a Christian's mission and the capitalist's right of exploitation. Non-Indian colonials were hell-bent on expansion. Tribal groups and federations were bound to lose for their failure to act in concert.

In spite of this, colonials dealt often for land as though tribal spokesmen were their diplomatic equals. Until the 1750s, ranking officers in the several colonies were responsible for Indian diplomacy, or war, over land. Beginning in the 1750s, Superintendents of Indian Affairs did the work of diplomacy while British generals or

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[10] *The Laws of Nations or the Principles of Natural Law* (Washington, DC: Carnegie Institution, 1916), 37-38, 84-86.

[11] The official view of sovereignty is summarized in a note attached to the Land Law of 1796 printed in the 1861 edition of *Statutes at Large.* 4 *Stat.*, 465.

colonial governors were in charge of war. By the terms of the Proclamation Act of 1763, Parliament made clear the separation of land ceded for colonial use from Indian Country. Through the 1760s, surveyors fixed an approximate line near the crest of the Appalachian Mountains. Officially, there were two jurisdictions, and a non-Indian could not enter Indian Country legally without permission from British authorities.

During the American Revolution, many White people crossed demarcation lines illegally with the breakdown of British vigilance. But the Second Continental Congress vested responsibility for Indian affairs in central not state or local government. Adopting colonial practices without substantial change, national authorities dealt with tribes as sovereign entities, resumed negotiations, and supposed that non-Indians might not enter Indian Country without federal permission.

Congressmen who legislated under the Articles of Confederation from 1781 to 1789 perpetuated the same assumptions. They attended to the separation of Indian Country from land owned or occupied legally by Whites, prohibited the entry of non-Indians for trade or settlement without permission, and tried to arrange the legal entry of pioneers.

The restraint of non-Indians was not easy, because arable land available for expansion was in short supply.[12] Inevitably, the scarcity forced Confederation congressmen into action. Quickly, they dispatched negotiators to bargain for acreages already occupied by squatters on the northwestern frontier, and to confine the tribes to smaller areas. At the same time, they stipulated in the Northwest Ordinance of 1787 that land in Indian Country belonged to tribes until it was relinquished by the consent of their spokesmen.[13]

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[12] Howard Lamar, *The Reader's Encyclopedia of the American West* (New York: thomas Y. Crowell Company, 1977). A survey of early federal land policy appears on pp. 632-642.

[13] Greater detail about early national Indian policy is available in Prucha's *The Great Father.*



The Ordinance of 1787 also dealt with the issue of jurisdiction on ceded land, where it specified that "criminal and civil . . . laws shall be in force," and for their enforcement the Governor of a Territory shall "lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships." It went on to say that when a population reached 60,000 free inhabitants, a state "shall be admitted . . . on an equal footing with the original states, in all respects whatsoever" with liberty to "form a permanent constitution and State government."[14] One supposes that "in all respects" included the application of "criminal and civil laws" on land ceded by Indians. A blue print for the transfer of jurisdiction over White and relocated citizen Indians from tribal through federal to state authorities was in place.

When the authors of the Constitution of the United States added the power to deal "with the Indian tribes" to the other prerogatives of Congress, by implication they ordered the perpetuation of previous practices, and placed ultimate authority in the legislative branch. To the end of treaty making in 1871, administrators concluded diplomatic settlements by and with the advice and consent of the United States Senate, and implemented treaty terms with allocations approved by both houses of Congress. After 1871, business pertaining to Indian territorial ownership or transfer remained a legislative prerogative exercised through "congressional agreements." All along, congressmen were in charge of fundamental issues pertaining to land and jurisdiction.

With acreage in short supply across the upstart agrarian nation, no issue was more critical to early national leaders than was territorial expansion through the application of the Northwest Ordinance, followed by the acquisition of land from Indians. To keep White people

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[14] I *Stat.*, 50-53.

out of areas recognized as Indian Country until arrangements for transfer were complete, congressmen made tribal land inviolate to any except those who entered with permission from federal authorities when they drafted Trade and Intercourse Acts, beginning with that of 1790.[15]

Ceded land in public domain was processed for private entry first under the 1785 Land Ordinance, then through the 1796 Land Act and subsequent legislation. The attachment of a footnote to the 1796 Act in the 1861 edition of *Statutes at Large* not only summarized legal assumptions regarding sovereignty and jurisdiction, but also indicated their abiding application.

> Discovery constitutes the original title to lands on the American continent, as between the different Europeon nations . . . [and] the right of soil, which had been previously in Great Britain, passed definitely to the United States.
>
> The United States, or the several states, have a clear title to all the lands . . . subject only to the Indian right of occupancy . . . . Whenever a tract of land has been once legally appropriated to any purpose . . . [it] becomes severed from the mass of public lands: and no subsequent law or proclamation, or sale, would be construed to embrace it. . . . A state has a perfect right to legislate as she may please. . . . But Congress are invested by the constitution with the power of disposing of public land. . . . Whenever the property is passed . . . [by federal laws, it] like all other in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed, and was vested.[16]

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[15] 4 *Stat.*, 469-474.

[16] 4 *Stat.*, 465.



Down to 1861, Congressmen evidently thought it traditional and axiomatic that acreages acquired from tribes, and transferred to public domain for private entry under federal land legislation, fell under state jurisdiction. The same disposition was implicit in congressional action over the next several decades. National attention focused upon the industrial revolution in the East, which thrived on resources and services from hinterland economies in territories and states of the trans-Mississippi West. Immigrants entered freely under congressional legislation that screened new arrivals only for national origins and objectionable tendencies. Population grew by some 33,000,000 from immigration in only seventy-five years.[17] On frontier provinces acquired through Indian wars, treaties and congressional agreements, immigrants and citizens from the East who crossed the Mississippi River found ample space to settle on plots governed by federal land legislation, which was amended often to suit western conditions. After a lull in state making caused by post-Civil War partisan conflict, nine new western states entered the Union in less than a quarter century, beginning with four under an omnibus bill in 1889. The ceded land they contained passed from tribal through federal to state jurisdiction according to congressional policy. From appearances, no federal official said otherwise about the transfer of jurisdiction over ceded aboriginal land.[18]

### *General Application of the Dawes Act*

All the while, Indian tribes were segregated from Whites on reservations managed by employees of the

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[17] Henry Steele Commager's piece about the impacts of immigration on the character of Americans in *Modern Maturity* (February-March 1986) contains this estimate for the period 1865 to 1940.

[18] For example, the Yankton Sioux surrendered aboriginal claim and jurisdictional authority on 11,155,890 acres in present-day South Dakota east of the Missouri river when they accepted recognized claim to 430,000 acres in the 1858 Washington Treaty.

U. S. Indian Field Service, wherein additional acreages were relinquished and opened for non-Indian settlement. Section 5 of the Dawes Act of 1887 created procedures whereby communal tracts they contained could be dissolved and allotted to individuals by executive action. With allotting agents at the scene—often in the presence of ill-qualified interpreters, irate tribal traditionalists, meddlesome missonaries, and troublesome White hangers-on-tracts deemed adequate for subsistence farming or ranching were parceled out among tribal members in severalty. Section 6 of the Act prescribed that on the completion of the "patenting of lands to said allottees" they would "have the benefit" and "be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." After tribal needs for allotments were satisfied, surplus areas could be "sold or released to the United States" by tribes "for the sole purpose of securing homes to actual settlers," whose example was to encourage agrarian interest among Indians. (This was the heart of the General Allotment Act.).[19] The United States either purchased surplus lands, or managed their sale piecemeal as rapidly as demand allowed. Proceeds went into tribal accounts to educate and sustain allottees and their families, who were expected to attain self-sufficiency from allotted or heirship land. On each reservation so administered, some Indians filibustered or protested rigorously at every stage in the application of the Dawes Act, but on most reserves a majority acceded to the plan, albeit under duress.

Historians of Indian-White relations understand that the applications of Sections 5 and 6 of the Dawes Act on most reservations failed miserably at the time. Reasons included the termination of treaty annuities, and depletion of tribal accounts, before self-sufficiency was attained; a disinclination by many Indians to take up farming and ranching full time; the infertility of acreages on allotments; land hunger among Whites; adverse climatic

[19] 24 *Stat.*, 388.



conditions; an inadequate land base; and the general discouragement of Indians about their increasing dependence on paternalistic regimes in charge of their reservations.

Students of the applications of the Dawes Act on western reservations know, too, how little Indian allotments have contributed to reservation economies since the Dawes Act was applied. Only three families in an enrolled population of more than 2,000 Yankton Sioux, whose administrative history is most familiar to the writer, attained self-sufficiency from their own land by the 1920s. Few more than that have relied mainly on farming and ranching for livelihood at any time over the past half century. The loss of land has been a principal cause. Collective Yankton acreage was reduced from 11,155,890 to approximately 40,000 acres in eighty years. By 1940, Yanktons retained recognized title to an area containing only 3.6 percent of the tract to which their predecessors ceded aboriginal claim.[20] On acerage, the other Sioux tribes fared little better.

Sensitive observers have looked back on this with deep regret and desire to somehow rectify a tragic error in the history of Indian-White relations. Surely, additional recompense beyond recent monetary payments through claims awards would be just. It should not be tailored by judges, however, or counsel, or expert witnesses, or historical consultants seeking retribution through jurisdictional adjudication. Recompense should be made through some other means, and jurisdictional disputes resolved by a search for congressional intent in developments related to the applications of state, federal and tribal governance within the same original reservation areas.

To the question of whether congressmen meant to leave federal and tribal jurisdiction intact throughout all lands contained by the original borders of their reservations, or

[20] Charles J. Kappler, *Indian Treaties, 1778-1883* (New York: Interland Publishing, Inc., 1972), 776-780.

intended to transfer jurisdiction from tribal to state and local governments over land ceded as surplus for entry by Whites within those boundaries, there is a reply by implication in most statements by congressmen and administrative officials regarding the general purposes of the Dawes Act. In various ways, Henry Dawes himself expressed the belief that "the time is not far distant when the holding in severalty will prevail all over this country among Indians as well as white men." [21] By this he surely meant to encourage de-tribalization. In 1905, the Acting Attorney General of the United States wrote: "Undoubtedly the ultimate purpose of the allotments provided by the Act of 1887 is to wipe out the reservations." His belief in the elimination of tribal governance was clear, and he added that "it is for Congress, and not for the courts, to say when that purpose shall take effect." [22] His view of "ultimate purpose" expresses the expectation of de-tribalization, and so do many other official opinions pertaining to the Dawes Act in that era. (See Appendix B) From a broad and general survey of JURISDICTIONAL HISTORY, an historian is likely to conclude that tribal jurisdiction over aboriginal land was ceded with title, and that tribal authority over land on reservations was considered a temporary expedient even on the acreages assigned to allottees.

Recent literature on the GENERAL GOAL OF FEDERAL INDIAN POLICY for that era bears a similar message. Policy reflected suppositions handed down from colonial times: Vattel's hypothesis; preemption rights to sovereignty and supreme dominion over tribes by the United States; and Christianity coupled with free enterprise economics as guiding features in federal goals. Field Service administrators and missionaries backed by congressional

[21] 49 Cong., 1 Sess., *Congressional Record*, p. 1559.

[22] "Authority of the United States over Indians—opinion of Acting Attorney-General," Department of Justice, Washington, D.C., May 35, 1905. The writer found this in Fort Peck Letter Books at the Federal Archive and Records Center in Kansas City.



support labored to transform Indian people into self-supporting citizens of the United States, to separate them from tribal ties, and to attach them to White institutions, including those of governance. Congressmen authorized as they funded these processes year after year with published information at hand regarding administrative efforts, and considerable instruction from lobbyists with influence they could not ignore. That congressmen knew the reduction of tribal authority was part of the general plan they authorized and funded is surely implied in appropriate chapters of Francis Paul Prucha's *The Great Father*, for example, and the text of William T. Hagan's *The Indian Rights Association*.[23] The latter indicates clearly that the imposition of mainstream beliefs and practices in place of Indian habits and philosophies in most of their manifestations was the goal of fawning eastern do-gooders with enormous influence among congressmen, and implies that the destruction of tribal authority was part of the acculturationists' plan all along.

Records pertaining to the AFFECTS OF FEDERAL POLICY on tribal governance within the reservations of Sioux Country, at least, suggest that the congressmen who listened to reformers could not have been blind to what was happening at the grass roots. For the contents of federal documentary holdings, mission files and other archival collections as well as secondary sources reveal that several forces were openly at work to undermine tribal governments through the period 1887 to 1934. (a) One important influence was the abiding erosion of legitimate tribal authority that had taken place through official action since the Age of Jackson. (b) Another force was the intensified program of acculturation instituted as the Peace Policy under Ulysses S. Grant. In support of these older commitments, (c) a third was a federal plan exercised in most agencies between 1880 and 1910 to supplant traditional tribal governments with Business Committees under the control of Agents and

[23] Tuscon: The University of Arizona Press, 1985.

Superintendents, who either manipulated their agendas or rendered them defunct by the outset of the 1920s.

(a) Relentless effort to undermine tribal authority from the Jackson era was a key to success in every de-tribalization effort while the Dawes Act was in effect. An early statement of intent to make this part of federal policy for trans-Mississippi tribes appeared in a plan for acculturation submitted by Saint Louis Superintendent William Clark to Secretary of War James Barbour, on March 1, 1826, in which he urged federal action to acculturate tribal members—among other things "to teach them to . . . establish laws for their government," and to gather in settlements "over which a competent agent should be placed with full power of conducting the executive part of a Government." [24] Soon a plan like this was implemented widely by U. S. Agents, U. S. Farmers and other regular employees of the Indian Field Service, with ever increasing effect.

(b) At considerable expense to tax payers and tribal accounts, the plan exercised by Jacksonians was enlarged and enforced on reservations under Ulysses S. Grant's Peace Policy. Field Service employees and missionaries labored with congressional encouragement and support to educate young Indians about non-Indian culture, to put them to work mainly as farmers and ranchers, to supplant individual attachments to tribes with ties to civil governments through citizenships and in the process to subdue if not dismantle traditional Indian governments. The application of these strategies culminated in a frenzy of citizenship awards and fee simple land issues followed by the depletion of tribal accounts with per capita payments. By the early 1920s, many grass roots observers thought de-tribalization for most Indians was nearly accomplished.

(c) The notion that men in Congress who flaunted mainstream American culture around the world might

[24] Record Group 75, M234, roll 747, National Archives.



have wavered in its imposition upon Indian tribes through the period in question is not only illogical, but is also inconsistent with records pertaining to the reactions of agency personnel toward tribal governance while the Dawes Act was in effect. In documents preserved for Sioux Country at least, there exists in correspondence of War and Interior Department officials up and down the chain of command unmistakeable agreement in the belief that the manipulation of tribal government was essential to the control of the tribes, and the dissolution of tribal authority was a key to the detachment of individual Indians from tribal ties for entry into mainstream society as citizens. Methodically over the years, they dismantled traditional governments by fairly uniform procedures. Characteristically, federal officials replaced government by traditional chiefs and headmen as recognized forces on reservations with "made-chiefs" and advisory committees comprising other compliant Indians, and these in turn with elected assemblies, or general councils, which delegated authority to Business Committees chaired by agency Superintendents. The Committees voted on such things as land management, claims development, tribal fund allocations, and tribal memberships. They were summoned infrequently at the pleasure of Superintendents, sometimes remained inactive for years, and in most though not all instances were defunct by the early 1920s. Traditionalists protested in vain against the erosion of independent tribal authority through petitions and delegations to Washington, DC. For Sioux Country it is fanciful to suggest that any viable, federally recognized tribal government of the people's unencumbered choice existed on a reservation by 1910.[25] Where Indians participated in decisions about the general affairs and resources of their tribes at all, it was through Business

[25] An example of the long term process of dismantlement is contained in Herbert T. Hoover, "The Yankton Sioux Experience . . . 1900-1930," *The American West* (Toledo: the University of Toledo, 1980), 53-72.

Committees headed and controlled by agency Superintendents.

In spite of this, during recent proceedings lawyers argued, and evidently justices were swayed to believe, that effective tribal government existed with congressional sanction on a Sioux reservation through the Progressive Era, following the full implementation of the Peace Policy.[26] Their assumption must have evolved from scanty research, because Indian Field Service records, correspondence of Interior Department officials, Inspectors' Reports and congressional documents all indicate otherwise. Some federal officials may have been crooked and despicable, but few of them were fools enough to leave tribal governments intact. They picked them apart and transferred their functions mainly to regular agency employees. From the Agency, authority was delegated to employees at Sub-agencies or Farm Districts who dwelled in the communities. At the grass roots, Sub-agents and Farmers (one and the same in many instances) marshalled the forces around them effectively to remain in control.[27]

Included in local teams were tribal members, mainly those of mixed-heritage with tractable dispositions. They served as Assistant, Additional or District Farmers; tribal Policemen; judges in Courts of Indian Offenses; and various wage labor employees. All Indian appointees were treated as liasons or instruments of social control. Their prerogatives were restricted and controlled by Farmers, Superintendents and other agency personnel. Tribal judges, for example, worked under federal policy like Justices of the Peace at the low end of an appellate judicial system wherein U.S. Farmers or Superintendents reviewed their cases with authority to reverse their decisions.

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[26] *Solem v. Bartlett.*

[27] The central roles of U.S. Farmers in reservation district management is evident in the article "Arikara, Sioux, and Government Farmers: Three American Indian Agricultural Legacies," *South Dakota History*, XIII (spring/Summer 1983), 22-48.



The contention that Indian officers recognized or employed by agencies gave expression to tribal sovereignty with congressional recognition cannot be defended through the examination of records pertaining to the local applications of federal Indian policy. Under federal sanction, Indian leaders exercised little authority in the lives of tribal members, and almost none over the lives of White people who settled on surplus lands pursuant to Sections 5 and 6 of the Dawes Act. (See Appendix C)

Rigorous effort by agency officials to dismantle and control if not destroy tribal governments should not have been allowed, according to recent popular opinion, but it went on with tacit approval by congressmen through allocations of funds without significant protest. What happened almost a century ago can only be superseded, either by congressional action or by an amendment to the Constitution of the United States. As the Acting Atorney-General put it in 1905: "it is for Congress, and not for the courts, to" legislate federal policy for affairs on Indian reservations.

If the urgency of need for some solution to current confusion regarding federal and tribal jurisdiction within the original boundaries of reservations is not clear enough in examples of conflict presented at the beginning of this paper, it is dramatically apparent in the review of briefs and decisions on jurisdictional boundary cases that have come before the federal courts since the early 1960s.[28] A colleague from the discipline of law on the faculty of the University of South Dakota underscores the need, and calls for the help of historians, in her review of five significant cases, which follows.

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[28] The initial overview of the General Allotment Act in Appendix B is helpful. Additional work must be accomplished in primary sources for each application of Section 5, however, in order to provide an adequate synthesis of information pertaining to its specific use.

## APPENDIX A: The Issue of Constitutional Guarantees

United States Senate Bill 2564, introduced by Barry Goldwater during the Second Session of the Ninety-ninth Congress on June 16, 1986, precipitated discussion regarding the consequences of granting tribal governments jurisdiction over Whites, or over Indians without tribal membership. The bill provided the administration of justice by the Salt River Pima-Maricopa Indian Community Court over criminal misdemeanor offenses. It went to the Committee on Indian Affairs with support from officials in Arizona state government and nearby cities, and with assurance that this Indian court was up to the task.[1]

Deputy Assistant U.S. Attorney General Victoria Toensing wrote the opinion that while under current law established in *Oliphant v. Suquamish Tribe* (1978) an Indian court had no jurisdiction over non-Indians, the Department of Justice supported the change in light of endorsements from non-Indian officials in Arizona. She raised questions, nevertheless, about the capacity of the Court to handle the caseload; the community to provide jail space; and the tribal government to assert jurisdiction without infringing on the constitutional rights of non-members: right to appointed counsel, trial by jury, proper administration of the test for intoxicated driving, application of proper rules of evidence, and right of appeal.[2]

Concern about the constitutional rights of persons tried by the tribal court gained more succinct expression from South Dakota Attorney General Mark V. Meierhenry. In a letter to Senator James Abdnor on September 4, he expressed firm opposition to S. 2564 because "Congress cannot constitutionally deprive an American citizen of his Bill of Rights guarantees" by placing him under a politi-

[1] 99 Cong., 2 Sess., S. 2564; Letters of support attached to the bill when it went to Committee.

[2] Statement of Victoria Toensing . . . before the Select Committee on Indian Affairs, United States Senate, July 23, 1986.



cal force not bound by constitutional constraints. At risk were the republican form of government guaranteed to each state group, right to appoint counsel, right to a jury of persons "from which members of a defendant's race are not automatically excluded," and right to trial by a political system in which one may participate. Any bill extending jurisdiction to a tribe over non-Indians, Meierheny contended, would have to contain safeguards to assure these rights.[3]

[3] South Dakota Attorney General Mark V. Meierhenry to James Abdnor, September 4, 1986.

## APPENDIX B: The Purposes of the Dawes (General Allotment) Act of 1887

While congressmen debated the bill that became the Indian Reorganization Act of 1934 (which reversed the philosophy behind the Dawes Act), the Office of Indian Affairs employed D. S. Otis to write a history of the act of 1887. He explained how it transformed earlier piecemeal efforts to place Indians on individual farms and ranches into a general plan for severalty in most of the tribes, discussed arguments that led to its passing, identified groups that had been for and against it, and described its early application.[1] When Francis Paul Prucha prepared Otis' report for reprint in book form, he wrote in the introduction that "to many reformers" who shared responsibility for the passing of the bill authored by Henry Dawes "this was the most important means of destroying tribalism," and that Otis had demonstrated "how the allotment policy fitted well into the dominant views of that age of individualism." [2]

Throughout his text, Otis quoted and paraphrased opinions to demonstrate that most reformers and legislators supported the act to prevent the further loss of Indian land, but "the supreme aim of the friends of the Indian was to substitute white civilization for . . . tribal culture. . . . Allotment was counted on to break up tribal life." [3] Other philosophies were influential. Mention that "Indians were of course making no use of natural resources which should be developed in the interests of civilization" expressed the legacy of Vattel.[4] But belief that "allotment was the legal method by means of which

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[1] *The Dawes Act and the Allotment of Indian Lands* (Francis Paul Prucha, editor; Norman: University of Oklahoma Press, 1973).

[2] *Ibid.*, x-xi.

[3] *Ibid.*, 8-9.

[4] *Ibid.*, 17.



. . . breaking down the reservations . . . was to be accomplished" expressed the social and economic purposes of most non-Indians.[5] In a summary remark, Otis expressed the opinion that "allotment was first of all a method of destroying the reservation and . . . secondly a method of bringing security and civilization to the Indians." [6] And he demonstrated in many ways that this was the popular solution to the "Indian problem" among most philanthropic reformers, legislators and members of the voting public.

The major fault in Otis' analysis was excessive reliance on published agency reports and congressional documents, and failure to use original sources generated the grass roots. Correspondence and inspection reports express far greater opposition to allotment and surplus land sales by Indians than he perceived. But primary sources corroborate the perception that both the popular goal of Whites and the accepted policy of congressmen and federal administrators was to de-tribalize Indians, and destroy their reservations.

This conclusion came from a substantial number of congressional publications, many of which contain succinct statements by members of Congress. Congressman Thomas Skinner of North Carolina made a typical argument in 1886 when he said that "tribal relations must be broken up"; Indians should "shake off the shackles of tribal authority." With more land on reservations than they could "profitably use," they should sell surplus so Whites "may get possession of them and come in contact with Indians." Through the possession of individual allotments and exposure to subsistence farmers would come "the most direct route to citizenship for the Indian." [7]

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[5] *Ibid.*, 21.

[6] *Ibid.*, 32.

[7] 49 Cong., 2 Sess., *Congressional Record* (December 15, 1886), 190.

"No better element can be found than the men who go out and settle upon the public lands, and make for themselves honest homes," said Senator Henry Teller from Colorado. "Give to our people . . . the right to go upon the Indian lands and make, side by side of the Indian farm, a farm tilled by the aggressive and enterprising Anglo-Saxon, and in a little while contact alone will compel these people to accept the civilization that surrounds them on every side." [8]

There was dissent all along. Back in 1880, a minority in the House Committee on Indian Affairs expressed the opinion that "it does not make a farmer out of an Indian to give him a quarter section of land," and went on to charge that "the main purpose of this bill is not to help the Indian . . . so much as it is to provide a method for getting at the valuable Indian lands and opening them up to white settlement." [9] In 1883, stronger opposition came from spokesmen for the Creeks in a memorial containing evidence of numerous instances where allotment and citizenship had led to extreme hardship.[10]

Generally, views expresesd in congressional sources support Otis's conclusions, however. Most congressmen and reformers favored the Dawes Act to destroy tribalism, to instill desire in Indians for self-sufficiency through personal initiative, to expose allottees to the example of agrarian subsistence by opening surplus lands within reservation boundaries to bonafide settlers, and to remove obstacles to citizenship in the United States. One would have to torture phrases considerably to show from majority opinions any inclination to preserve reservations or tribal authority. One would search in vain to discover a hint that congressmen who drafted and voted the Dawes

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[8] 49 Cong., 1 Sess., *Congressional Record* (February 25, 1886), 1763.

[9] 46 Cong., 2 Sess., House Report No. 1576.

[10] 47 Cong., 2 Sess., House Miscellaneous Document No. 18.



bill into legislation felt anything but antagonism toward tribal governance. Surely they would have opposed the notion that Whites who settled within reservation borders to serve as models for allottees might be subjected to tribal governance. This is not to say tribal authority would necessarily have offended all non-Indians; by the late 1880s, many lived without inconvenience on reservations as husbands of tribal women. It is only to recognize that the vast majority of congressmen in that era believed that tribal governments and reservations were temporary expedients soon to vanish as Indians received land in severalty and citizenship. The suggestion that White settlers might be placed under tribal jurisdiction, one suspects, would to them have seemed preposterous.

## APPENDIX C: The Erosion of Government in Tribes of the United States from the Age of Jackson to the 1920s

Infringement on the "ancient customs and laws of the much older tribal governments," to which Tim Tiago referred in his editorial, began when colonial merchants and administrators of New France selected middlemen for the fur trade. Historian Harold A. Innis wrote that "the best of hunters were rewarded with favors and promotions," and "governors made titular officers of those . . . accounted the best huntsmen and warriors." To each they gave "a coat, a pair of breeches and a hat, appointing him captain of a river."[1] To each, Innis might have added, they also extended advantage in the exercise of influence among tribal members around them for their central roles as liasons between suppliers of trade goods and Indian consumers. For diplomatic purposes, early Canadian fur trade operatives engaged in a practice known to officials of the United States in the nineteenth century as "chief-making."

Meriwether Lewis and William Clark, and Pierre Choteau Jr.'s leading Upper Missouri River trade operative, Honore Picotte, were among leading explores and merchants who engaged in this practice during early national history. In 1856, General William Harney founded Fort Randall near the center of Sioux Country, wrote about chief-making and its significance, and described his effort to alter the process for the enhancement of federal authority:

> Certain chiefs were recognized by the nation, others by the military, others again by the agents, and the traders, for their own purposes, have most unwarrantably given medals and appointed chiefs. . . . These conflicting interests necessarily weakened the authority of all these chiefs. . . .

[1] *The Fur Trade in Canada.* (New Haven: Yale University Press, 1930), 141.



> I have caused the Sioux nation to select and appoint a certain number of head chiefs and chiefs to govern them, and to see that they carry out the conditions to which they have assented in counsel; and I have informed them that these would be the only chiefs recognized by the President, myself, or their Indian agent.[2]

Harney designated leaders mainly to carry on diplomatic affairs, but his recognition gave them status within their tribes. Regardless of previous standing, they now were in position to influence Indian-White negotiations, the distribution of annuities, the choice of recipients for gratuities, the distribution of irregular agency employment, etc. Men who acquired positions in tribes by traditional means as well as those who did not were eligible for such "appointments." Only those who demonstrated steady support for federal policies retained recognition for long.

Chief-making became common practice among Field Service Agents as they founded reservations and searched for leaders to take over new bands formed by agency staff, and cooperative chiefs to replace traditional leaders as they passed away. On the Yankton Sioux Reservation, for example, Agent Alexander Redfield recognized Francis Deloria as "chief" of a new mixed-blood band. Redfield's successors, acting with approval from their superiors in Washington, DC, "made" Jumping Thunder chief in place of Smutty Bear, Felix Brunot then Blue Cloud chief in place of Petty Boy, John Ree chief in place of Made Bull, etc.[3]

Within approximately a quarter century, Greenwood agents reported the majority of chiefs to be compliant, and gained their approval for the replacement of tradi-

[2] 34 Cong., 1 Sess., Ex. Doc. 130, Harney to Secretary of War, March 5, 1856.

[3] Herbert T. Hoover, "Yankton Sioux Experience in the Great Indian Depression, 1900-1930," *The American West* (Toledo: University of Toledo Press, 1980), 57-68.

tional by republican tribal government under federal supervision. J. F. Kinney declared that chiefs were "not only useless," but also were impediments to "progress" on the reservation. In 1891, all who remained in office were induced to join a representative "Speaking Council." Young men who aspired to leadership positions through traditional means formed the "Sons of the Chiefs" and "Society of Orphans" in protest, but thier letters were ignored. In 1901, when made-chiefs Jumping Thunder and Medicine Cow passed away, Superintendent James D. Staley said he would no longer "recognize chiefs" on his reserve. After that, Superintendents permitted the elective council to fall into disuse. Later on, tribal spokesman Clement Smith recalled the subsequent existence not of effective tribal government, but only of "factional groups . . . floundering." [4]

Similar developments occurred around other agencies. At Sisseton, the constitutional "Renville Republic" collapsed in the mid-1890s, following the death of its only President, Gabriel Renville, leaving the tribe without effective central government until the New Deal Era. In most other Sioux tribes, the destruction of tribal authority was not as complete, but the process of erosion was similar.

Among Tetons, it began as early as 1878, when a commission recommended the distribution of rations to Upper Brule and Oglala family heads instead of to band leaders, and wrote that "the domination of the chiefs should be broken up" and replaced with authority by tribal officers elected for short terms. The chiefs exercised power with support from traditionalists, who were opposed to progress according to federal standards, and their removal had become "an agricultural necessity." [5] In 1880, Crow Creek Agent William Dougherty said

[4] *Ibid.*, 58-64.

[5] Report by Col. D. S. S. Stanley and Rev. A. L. Riggs, August 28, 1878, M234, roll 266, NA.



tribal government should be destroyed in order to undermine "traditions and prejudices . . . of which the head chief is the head repository." [6] In 1882, he recommended "breaking up the organizations of bands and tribes, and establishing the family as the basis of social organization," for it would then be possible to "impart to them some semblance of the manners, customs and laws of our civilization." As long as Indians lived on communal land "under the patriarchal system, they must continue to be trubulent, idle and expensive to maintain." [7]

In 1889, as General George Crook explained the terms of the Great Sioux Agreement, he warned Teton leaders that the survival of tribal government should no longer be assumed; "it does not necessarily follow that because you are chiefs today, that you are going to remain so in the future." Those who could not accept "this new departure" (confinement to reservation life) would "have to give way to those who can." Like drift wood, one who "keeps up with the current will be all right, and that which cannot is left on the banks." [8]

Many were "left on the banks" thereafter. At Rosebud, Agent George Wright threatened to jail recalcitrants, and said that those who were "at one time recognized as chiefs, representing the older men, who have outlived their usefulness," were going to be thrust aside.[9] This happened at Standing Rock, where the Agent authorized

[6] Captain William Doughterty to Indian Commissioner, September 22, 1880, Crow Creek Files, Federal Archive and Records Center-Kansas City.

[7] Captain William Doughterty, "The Sioux," December 10, 1882, Letters Received by the Office of Indian Affairs, NA.

[8] Proceedings of Council at Standing Rock Reservation on the Agreement of 1889, July 26, 1889, Irregular Shaped Papers #440, NA.

[9] Agent J. George Wright to Indian Commissioner, June 16, 1890, Letters Sent, Rosebud Agency, FA&RC-KC.

Phillip Bullhead to take over the band of Little Dog, and directed mixed-blood District Farmer Joseph Archambault to bring into it not only Little Dog's people, but also those in the bands of See-the-Bear and Moccasin, making thirty-nine families in all.[10]

Almost without exception, agents supplanted traditional leaders with tribal governments amendable to federal plans. For their efforts, they received support and publicity from ecclesiastical spokesmen, who shared their philosophy. In 1909, one of them wrote that "tribal organization in itself always opposed civilization . . . for civilization means its downfall. . . . Where any form of this organization exists . . . , there you have a chilling shadow in the way of . . . progress." [11]

Military leaders, agency personnel and missionaries all thrived on congressional support as they endeavored to manipulate, control, and in some instances destroy tribal government. The results of their efforts in Sioux Country varied from reservation to reservation. On those situated east of the Missouri River, tribal authority was either reduced to "factional groups . . . floundering," or for all practical purposes destroyed. On reservations west of the Missouri, where larger Indian populations were shielded from White influences by distance and the possession of terrain with marginal value for agriculture, tribal leaders were more successful in their defense of their prerogatives. Even there, the procedures of attack on tribal government were the same. Only the timetable was different.

Most populous and remote of all Sioux reservations was that of Oglalas around Pine Ridge. Truculent Valen-

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[10] U.S. Agent, Standing Rock, to Joseph Archambault, July 31, 1901, Standing Rock Files, FA&RC-KC.

[11] Augustus Field Beard, *A Crusade of Brotherhood: A History of the American Missionary Association* (Boston: The Pilgrim Press, 1909), 83.



tine McGillycuddy initiated a methodical attack on the prerogatives of Red Cloud and other traditional leaders in the mid-1880s with the establishment of an "Agency Council" of 100 "working and progressive" delegates from the Farm Districts. They spoke for the tribe on matters of interest to the Agency and for some years doubled as the Court of Indian Offenses.[12] Soon, officials in Washington, DC, joined the attack on traditional leaders, withdrawing recognition from them and approving compliant made-chiefs (in one instance, replacing Red Cloud by American Horse).[13]

"Old and non-progressive Indians who call[ed] themselves 'head Men and Chiefs'" organized an "Oglala Council" of 300 or more to defend their prerogatives, to oppose federal policies, and to assert treaty rights. At first, they held monthly meetings. Later, they gathered only two or three times a year. Never did they receive recognition as members of a legitimate political body by Indian Office officials.[14] In 1907, the Acting Commissioner of Indian Affairs agreed to raise no objection when they assembled to discuss general "questions of interest." But the Indian Office recognized only the body organized by the Agency, which was by then the "Business Committee appointed by the general counsel" of voting tribal adults, to reach official decisions about all matters except those which justified the assembling of the general council.[15]

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[12] Agent V. T. McGillycuddy to Indian Commissioner Hiram Price, May 4, 1884, Letters Received, NA; Pine Ridge Annual Report, [ ], Letters Sent, FA&RC-KC.

[13] Secretary of the Interior to Acting Commissioner of Indian Affairs R. V. Belt, July 1, 1889, Letters Received, NA.

[14] Superintendent John R. Brennan to Indian Commissioner, June 24, 1909, Letters Received, NA.

[15] Acting Commissioner C. R. Larabee to Pine Agent, April 26, 1907, Letters Received, NA.

The Oglala Council asserted its influence, to be sure. For example, from 1902 to 1906 it foiled the efforts of Agent John Brennan and the Business Committee to arrange the lease of tribal pastures to a livestock syndicate. At length, Brennan dropped the issue for fear of provoking unnecessary friction in the tribe.[16]

This was an exception, however, because even on remote Pine Ridge "progressive" leaders spoke in ever increasing numbers favoring cooperation with the Agent. Several wrote as early as 1894, urging federal officials to "do away with this Chieftain business which is unprogressive" and to rely on "regular councils . . . as the white men have . . . to encourage and assist progressive Indians." [17] The number of men with this disposition grew as the tribe became increasingly dependent on federal support. In 1917, when compliant voting adults were in the majority and traditionalists of the Oglala Council were silent, Superintendent H. M. Tidwell called for the election of a new business committee of twenty delegates from farm districts, by ballot in general council, to function as an "executive committee" or "deliberative body of practical size to consider and act on the ordinary business of the tribe." [18] This committee carried on tribal affairs under supervision by the Superintendent until the 1930s, when the general council adopted and the people voted approval for a constitutional government to operate under the terms of the Indian Reorganization Act.[19]

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[16] John R. Brennan to Indian Commissioner, November 3, 1902, April 14, 1905, November 17, 1906; Oglala Council to John R. Brennan, November 11, 1906, Letters Received, NA.

[17] George Standing Bear, Henry Twist and Fast Forse to Indian Commissioner to D. H. Browning, October 13, 1894, Letters Received, NA.

[18] Pine Ridge "Constitution, By-laws, and Resolutions," Indian Central Classified File, IRA Records, NA.

[19] Acting Commissioner A. C. Monahan to Secretary of the Interior, November 30, 1935, Pine Ridge IRA Files, NA.



On Pine Ridge Reservation, traditional Oglala leaders stood more tenaciously against the erosion of their authority over central tribal affairs then did leaders anywhere in Sioux Country except perhaps those at Standing Rock, and obviously the Oglalas were unsuccessful in the effort to preserve their central power. On Pine Ridge, a similar process of erosion took place in the communities, where traditional bands and their leaders were replaced for official purposes by Farm Districts and officers "made" by the Superintendents. After the Agency Council doubled for a time as the Court of Indian Offenses, special judges were appointed to the Indian Court as regular agency employees at the salary of $7 a month. Mainly, they worked in cooperation with salaried tribal policemen toward social control under supervision by the U. S. Assistant or Additional Farmers in the Districts. Case loads were sparse, according to a 1915 report, but fairly significant. "Over previous years" the judges had tried forty-seven criminal cases "dealing with assault, adultry, forgery, cattle stealing, timber cutting, elopement, contempt of court, drunkenness, fighting, wife beating, seduction and perjury." [20] Without question, the judges and policemen performed vital services of governance. They did so not as officials of their tribe, however, but as regular agency employees on salaries under direct supervision from Farmers, who in turn functioned as sub-agents under Superintendents at Pine Ridge. And they behaved like agency employees, especially when dealing with traditional ceremonies regarded inconsistent with Indian Office orders, such as the practice of Peyote religion.[21]

At the community as well as the central level, on most reservations tribal members participated in governance through the era when the Dawes Act was in effect. But

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[20] Inspectors Fred S. Cook and H. S. Traylor, "Oglala Council" Report, received July 12, 1915, Indian Central Classified File, NA.

[21] Pine Ridge Inspection Report, July 7, 1915, Indian Central Classified File, NA.

they did so as agency operatives more than tribal leaders under close supervision, and the power they exercised diminished considerably. In primary sources pertaining to their activities, there is nonetheless evidence that they functioned to control some patterns of behavior among Indians who occupied Indian land. Nowhere in these records does evidence appear to state or demonstrate their power of jurisdiction over non-Indians within reservation boundaries, however, on land ceded as surplus for occupancy by bondifide settlers.

Inasmuch as congressmen had access to correspondence and reports on reservation life, and allocated funds to support it, one must assume that governance which existed approximated governance which congressmen meant to support. One's inclination regarding what congresional intent should have been does not alter the contents of a great body of original documents. They lead to the conclusion that congressmen as well as administrators meant to diminish, constrain and in places destroy tribal governance as part of the plan for de-tribalization, and intended not to authorize tribal authority over Whites who occupied ceded land, or citizen Indian allottees who held patents in fee, within the original boundaries of trans-Mississippi western reservations.



# CONGRESSIONAL INTENT REGARDING JURISDICTION ON CEDED LAND DURING THE ALLOTMENT ERA

## PART II: THE LAW

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LeAnn Larson LaFave, Associate Professor of Law
University of South Dakota School of Law
© Vermillion, South Dakota 57069

## INTRODUCTION

In most areas of Anglo-American jurisprudence, a coherent body of law develops when a series of appellate cases are decided in such a way that one decision lends precedent to the next decision. Each new case places the court at a fork in the judicial road. In most cases, courts will follow the familiar path of past legal precedents. Occasionally, however, courts detour from established precedents. If two cases cannot be reconciled, they are distinguished, and the law thereafter develops along two separate paths. Other times, a well-worn road is abandoned, as precedents which no longer reflect current legal, social or political values are overruled. A landmark decision often results when a past precedent is overruled, and a new legal trail is blazed.

Indian law, however, often defies precedent. Old roads as well as new roads may be abandoned without adequate legal or policy justifications. New trails are often not clearly marked. Decisions which could have been landmarks [1] are seemingly disregarded by subsequent courts. For lawyers litigating Indian law issues, it is almost impossible to "map" current developments in Indian law. The body of Indian law lacks coherence and consistency.[2] Indian law seems to be developing on a case-by-case

[1] Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) is a case in point.

[2] "Indian law . . . is a bottomless pit." NATURAL RESOURCE SECTION, OFFICE OF ATTORNEY GENERAL, A REVIEW OF THE SOUTH DAKOTA LAND CLAIMS xii (1983). Three Assistant Attorneys General co-authored the report; John P. Guhin, Harold H. Deering, Jr., and Mark Smith. Confusion has also been noted by commentators, (*See* Campbell, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment*, 12 AM. IND. L. REV. 57 (1984)) and litigants, Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, Utah v. Ute Indian Tribe, *petition for cert. filed* 55 U.S.L.W. 3071 (U.S. May 5, 1986) (No. 85-1821) [Hereinafter, Petition for Writ of Cert., Utah v. Ute Indian Tribe].



basis, without adhering to precedent and without establishing landmark decisions from which a coherent body of law might begin to develop.

These disturbing developments in Indian law jurisprudence are especially apparent in the disestablishment cases,[3] sometimes referred to as boundary cases or diminishment cases. Such cases typically arise out of disputes between Indian tribes or tribal members and state or local governments. At issue is the respective authority of tribes and other governmental units to exercise jurisdiction over land areas once set aside as Indian lands and later opened for settlement pursuant to § 5 General Allotment Act [4] surplus lands acts. "Enacted over a span of almost thirty years after the passage of the Dawes Act of 1887 [General Allotment Act, 24 Stat. 390 (1887)], these statutes provided for the allotment in severalty of tracts of land on specific reservations to individual tribal members, and then for the opening of the surplus lands to settlement." [5] The fundamental issue in each of the disestablishment cases is: Did Congress intend the surplus lands acts to diminish reservation boundaries?

Recent disestablishment decisions by the United States Supreme Court, the United States Court of Appeals for the Tenth Circuit, and the United States District Court

[3] There are five major Supreme Court disestablishment decisions: Seymour v. Superintendent, 368 U.S. 351 (1962); Mattz v. Arnett, 412 U.S. 481 (1973); DeCoteau v. District County Court, 420 U.S. 425 (1975); Rosebud Sioux Tribe v. Kneip, 430 U.S. 581 (1977); and Solem v. Bartlett, 465 U.S. 463 (1984). A pending case may also become a major case: Utah v. Ute Indian Tribe, 521 F. Supp. 1072, *aff'd in part and rev'd in part*, 716 F.2d 1298 (201) (10th Cir. 1983), *aff'd in part and rev'd in part, on rehearing en banc*, 773 F.2d 1087 (5-2) (10th Cir. 1985), *petition for cert. filed*, 55 U.S.L.W. 3071 (U.S. May 5, 1986) (No. 85-1821).

[4] General Allotment Act, 24 Stat. 390 (1887), § 5.

[5] Campbell, *supra* note 2, at 57.

for the District of North Dakota [6] have "compounded the confusion produced by the contradictions and conflicts already existing among the previous decisions in this area." [7] Important historical facts relating to legislative intent and federal policies regarding Indian people, Indian tribes and Indian lands, have been misapplied, misinterpreted, or ignored. Such cases violate available legal precedents while ignoring historical facts which are essential to a well-reasoned resolution of issues relating to Congressional intent. In some cases, "bad law" results because attorneys have failed to provide the courts with an adequate evidentiary record (e.g., testimony of qualified historians, historic documents, and legislative histories) from which a court could make factual findings to support legal conclusions regarding intent. In such cases, there is simply no historical evidence, and courts are left to function in an historical vacuum.[8] In other cases the historical record presented has been somewhat one-sided and incomplete. Historical reports which would be unacceptable by historian's standards have been given great weight by these courts. In still other cases, where limited historical evidence has been presented, courts have ignored or improperly interpreted such evidence, rendering decisions which might fairly be characterized as knowing attempts to rewrite history to reflect contemporary notions of social justice or political expedience rather than the intent of legislative drafters.

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[6] See cases cited *supra* notes 2 and 3, and United States v. Grey Bear, 636 F. Supp. 1551 (D.N.D. 1986).

[7] Motion of the Counties of Dewey, Ziebach, and Corson, South Dakota and the County of Sioux, North Dakota, for Leave to File Petition for Rehearing and Petition for Rehearing, at 2-3, Solem v. Bartlett, 465 U.S. 463 (1984). Also, see generally, Campbell, *supra* note 2.

[8] Seymour v. Superintendent, *supra* note 3; Mattz v. Arnett, *supra* note 3.



The current state of the law raises several perplexing questions: Why have the courts seemingly strayed so far off any definable course in the disestablishment cases? Why has no clear standard of construction emerged which might bring some order to the currently chaotic disestablishment adjudications? Will the United States Supreme Court seize an opportunity to clarify current confusion with a truly definitive statement?

In searching for possible answers to these questions, let us begin by retracing the steps of the United States Supreme Court in the five leading disestablishment cases decided to date: *Seymour v. Superintendent,* 368 U.S. 351 (1962); *Mattz v. Arnett,* 412 U.S. 481 (1973); *DeCoteau v. District County Court,* 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 581 (1977); and *Solem v. Bartlett,* 465 U.S. 463 (1984). Tracing the evolution of standards for determining Congressional intent in the disestablishment cases, perhaps a "missed turn" will be discovered, or a new path uncovered. After looking to past cases for guidance, one can look ahead to the critical juncture in the development of disestablishment case law which is looming on a not too distant horizon. The pending case of *Utah v. Ute Indian Tribe,*[9] currently on writ of certiorari to the United States Court of Appeals for the Tenth Circuit, will be analyzed as a potential landmark decision. The United States Supreme Court has the opportunity, in *Ute,* to clearly articulate a standard of statutory construction which encourages historical inquiry in the adjudication of Congressional intent issues. If such a standard is defined and followed, historians will play an essential role in assisting courts to understand and interpret historical facts relevant to the determination of issues of legislative intent. With adequate development and application of historical facts in disestablishment cases, perhaps legal conclusions based on

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[9] See *supra,* note 3.

those historical facts will begin to evolve into a series of consistent, coherent precedents.

## STANDARDS FOR DETERMINING CONGRESSIONAL INTENT IN THE FIVE MAJOR DISESTABLISHMENT CASES

### *The Broad Context: Statutory Interpretation in the Supreme Court*

"The legitimate scope of a court's authority to make law where a legislature has spoken . . . is a recurring issue in American legal thought." [10] The Supreme Court has wrestled with two competing versions of the "proper" judicial role in statutory construction cases. "One version grants primacy to the legislature as the author of the statute and therefore emphasizes the statutory text or legislative intention. . . . The second version grants primacy to the judicial reader or interpreter of the statute and therefore emphasizes the creative role of common law courts." [11] Each version has enjoyed dominance during at least one regime of academic thought. These regimes which influenced judicial behavior were catalogued by Professor Paul N. Cox of Valparaiso University as follows:

> The first regime, which shared some of its values with legal positivism, prevailed in the late 19th and early 20th centuries. Under it, courts . . . were to emphasize the plain meaning of statutory text. . . . [T]ext had primacy under such a view.
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> . . .
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> The second regime, which may be identified with legal realism, . . . denied the authority of text by demonstrating the indeterminacy of the meaning of

[10] Cox, *Rumination on Statutory Interpretation in the Burger Court*, 19 VALPARAISO UNIV. L. REV. 287, 288 (1985).

[11] *Id.* at 289.



> language and denied the authority of legislative intent by pronouncing it a fiction. Judges on these premises are largely free from legislative will.
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> . . .
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> The third regime, perhaps best represented by the Legal Process School . . . recognized the freedom of judges to choose between alternative interpretations of a statute. . . . The language of statutory text, while not controlling, limited possible choices. . . . [T]he third regime substituted legislative purpose as the fundamental basis. . . . [T]he third regime . . . treat[s] author and interpreter as rough equals.
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> [W]e may have entered an era of the fourth regime, the regime of chaos. . . .
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> . . .
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> If there is therefore no currently dominant interpretive regime . . . it has nevertheless been recently claimed that a particular interpretive strategy has come to prevail in . . . the Burger Court: the strategy of literalism. If so, the Court has returned full circle to a version of the first regime and to the contradictions of that regime: the text has primacy, but its force is to be strictly limited to the language employed by the national legislature.[12]

Because Indian law develops within a larger body of law, problems of statutory interpretation which currently plague Indian lawyers may also be plaguing our colleagues in other legal specialties. Attempts to change the Court's approach to statutory construction issues in the Indian law context may be more difficult where the Court as a whole is operating in another regime.

[12] *Id.* at 290-295.

*The Narrower Focus: Congressional Intent Determinations in Five Major Disestablishment Cases*

During the past quarter century, the United States Supreme Court has on five occasions addressed questions of disestablishment or diminishment of Indian reservations.[13] In each case, the Court interpreted acts of Congress which opened surplus lands (lands remaining after allotments to individual Indian tribal members) to non-Indian settlement, to determine whether those surplus lands acts were intended to change or diminish reservation boundaries. None of the cases has yet emerged as a controlling precedent. None of the cases has as yet been overruled by a subsequent disestablishment case. In each case, the Court has at least given lip service to the need to determine Congressional intent, but rules of construction have shown little consistency in application. The court has heretofore failed to adopt a general historical perspective when interpreting surplus lands acts. Instead, the court seems to be proceeding on a case-by-case, reservation-by-reservation basis when adjudicating disestablishment issues. Confusion abounds, as commentators both favoring and opposing disestablishment results freely admit.[14] During the October 1986 Term, the United States Supreme Court will again have an opportunity to clarify the confusion in yet another disestablishment case, *Ute v. Utah Indian Tribe,* 521 Supp. 1072, *aff'd in part and rev'd in part,* 716 F.2d 1298 (2-1 decision) (10th Cir. 1983), *aff'd in part and rev'd in part, on rehearing en banc,* 773 F.2d 1087 (5-2 decision) (10th Cir. 1985), *petition for cert. filed,* 55 U.S.L.W. 3071 (U.S. May 5, 1986) (No. 85-1821).

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[13] See *supra* note 3.

[14] See *supra* note 2. *See also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 223 nn.56 and 57 (1982 ed.).



*Seymour v. Superintendent*

In *Seymour* a member of the Colville Indian Tribe was convicted of burglary in a Washington state court. In a habeas corpus proceeding, Seymour alleged that the state court which had convicted and sentenced him was without jurisdiction, since the crime he had allegedly committed took place in the southern half of the Colville Indian Reservation, within "Indian country."[15] The Washington Supreme Court denied the petition, holding that the southern half of the Colville Indian Reservation had been disestablished and was therefore no longer "Indian country." On writ of certiorari, the United States Supreme Court reversed. It found that the surplus lands act of 1906 did not diminish the original boundaries of the reservation.[16] The case was decided in an historical vacuum. No reference was even made to the General Allotment Act or to the legislative history of the surplus lands act in question, and no one addressed the fact that the 1906 act was based on a formal cession agreement. S. Rep. No. 1424, 59th Cong., 1st Sess. (1906). In construing the statute, without aid of historical facts, the court relied primarily on the language of the act and a comparative statutory analysis (comparing one act with an earlier act or resolution).

*Mattz v. Arnett*

In *Mattz v Arnett,* 412 U.S. 481 (1973), the California Director of the Department of Fish and Game

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[15] 18 U.S.C. § 1151 defines Indian country to include a) all lands within the limits of any Indian reservation; b) dependent Indian communities; and c) allotments.

[16] Act of March 22, 1906, 34 Stat. 80. Perhaps *Seymour* is most remembered for its dicta, in which the Court distinguished Act of 1892, 27 Stat. 62, 63, the express terms of which "vacated and restored to the public domain" the northern, disestablished half of the Colville Indian Reservation. The Court thus implied that Congress had intended some tracts of former reservation lands should be subject to state law. 368 U.S. at 354-55.

brought an action against a member of the tribe to forfeit confiscated gill nets used in fishing. The defendant alleged he could not be denied his fishing rights within Indian country, and his use of the gill nets had occurred within the boundaries of the Klamath River Indian Reservation. The outcome of the case hinged on the interpretation of a surplus lands act, Act of June 17, 1892, 27 Stat. 52. The United States Supreme Court held that the Act of 1892, while containing allotment provisions, was not intended to terminate the reservation. The Court accepted a standard whereby Congressional intent to terminate reservations must be expressed on the face of the act *or* must be clear from surrounding circumstances and legislative history. In a marked departure from the method of statutory construction employed in *Seymour*, the Court considered evidence relating to the history of the Klamath Reservation, the legislative history of the 1892 Act, the legislative history of bills which were defeated which would have expressly abolished the reservation, and evidence of subsequent treatment of the land as reservation land by the Department of the Interior. *Mattz* thus marked a tentative beginning of the development of a historical interpretation of surplus lands acts. Although the Court had a historical perspective of sorts, that perspective was distorted slightly by reliance on certain unfounded and conclusory statements of historical "fact." For example, the Court accepted at face value an unsubstantiated statement from the Solicitor General that the policy of the Dawes Act was to continue reservations.[17]

Despite a greater reliance on historical data, the distinction between § 5 of the General Allotment Act and other historical legislative enactments was blurred. No specific

[17] The Solicitor General has consistently argued against disestablishment in each of the reservation disestablishment cases. In order to remain consistent in advocated outcomes, however, the Solicitor General has been forced to shift legal theories in an attempt to meet courts' objections to previously rejected positions.



reference to § 5 was included in the court's opinion. The plain meaning of the statutes was still given greatest weight in the ultimate decision. In this regard, the Court expanded the category of language that could terminate reservations to include, in addition to the previously approved "vacated and restored to the public domain," "discontinued." Express references to abolished reservation lines was also deemed evidence of disestablishment.

*DeCoteau v. District County Court*

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Court determined that the Lake Traverse Indian Reservation in northeastern South Dakota had been disestablished by the surplus lands act, Act of March 3, 1891, 26 Stat. 989. In making its determination the Court had before it a complete legislative history of the General Allotment Act as well as the legislative history of the surplus lands act in question. The legislative history of the surplus lands act was read in context with post-Dawes Act developments. Nevertheless, the Court again placed great weight on the language of the 1891 Act, indicating that the plain language of the act indicated the tribe's *consent* to "cede, sell, relinquish and convey" its reservation lands.

In the context of § 5 of the General Allotment Act, the *DeCoteau* court had an opportunity to limit *Seymour* and *Mattz* to their facts. It declined to do so. Instead, it made a weak attempt to distinguish the two prior cases, while clearly indicating that *Seymour* and *Mattz* were still "good law." Justices Douglas, Brennan and Marshall, dissenting in *DeCoteau*, saw an inconsistency between the Court's majority opinion in *DeCoteau* and its earlier decisions in *Seymour* and *Mattz*. A focus on principle, rather than semantics, lends support to the dissenters' observation in that regard. However, read as a whole, the dissenting opinion is the antithesis of a general historical context standard for interpreting surplus land acts.

*Rosebud Sioux Tribe v. Kneip*

In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), the Supreme Court found that the original boundaries of the Rosebud Sioux Reservation located in south-central South Dakota, had been diminished by three surplus lands statutes, enacted in 1904, 1907 and 1910. The Court had the benefit of an extensive historical record. It examined the historical circumstances of all three statutes in great detail, as well as documents reflecting the Indian policy during the period in question, particularly § 5 of the General Allotment Act. Evidence of subsequent developments was also considered. Such evidence established actual assumption of state jurisdiction, unchallenged by Congress or the Department of Indian Affairs.

The Court announced and applied a workable three-part standard for determining Congressional intent. A court was to examine 1) the fact of the legislative act; 2) surrounding circumstances; and 3) legislative history.[18] Ascertainment of Congressional intent was clearly the determinative factor in the Court's decision. The legislative history reflected a clear intent to end reservation status. The Court was also influenced by the plain meaning of statutory terms relating to cession and relinquish-

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[18] 430 U.S. at 587. Although there was no evidence of consent by the Rosebud Sioux Tribe to relinquish its lands (consent had been a factor in *DeCoteau*, the absence of consent was not deemed controlling, since the acts construed in *Rosebud* were passed after the Supreme Court's decision in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). "After *Lone Wolf* in 1903 established that Congress could act unilaterally toward Indian lands and reservations, the only relevant inquiry became Congressional intent." The Court also seemed unconcerned about the absence of judicially-approved phrases such as "restored to the public domain" and "discontinued." The absence of such magic words did, however, concern the three dissenters, Marshall, Brennan and Stewart. Rosebud Sioux Tribe v. Kneip, 430 U.S. at 618 (Marshall, J., dissenting).



ment, similar to the language in the *De Coteau* surplu lands acts.[19]

*Rosebud* had all the indica of a potential landmark case. The Court's mode of decisionmaking in *Rosebud* could have been a prototype for subsequent litigation of disestablishment issues. The Court seemed to be clearly focusing its inquiry into the effect of surplus lands acts on Congressional intent, and that intent was construed against the backdrop of the General Allotment Act. It went on to indicate that the surplus lands acts should be read in their historical context, as the Court had done in *DeCoteau*, so that Congressional intent might be more accurately discerned. Yet *Rosebud* has not been subsequently applied as a landmark precedent.[20] Perhaps, if the Court at this point had clearly distinguished *Seymour* and *Mattz*, or limited those cases to their facts, the future conflicts encountered in trying to reconcile those vestigial cases with later pronouncements could have been avoided,[21] and a coherent body of disestablishment case law could have sprung from the *Rosebud* decision.

Recent judicial history, however, indicates that *Rosebud* has not been treated as a definitive landmark decision. Instead, it has been relegated to a status of just one of the four preceding disestablishment cases which the court in *Solem* could not reconcile. Several observers, particularly those litigating on behalf of non-Indian clients and governmental units in current disestablishment controversies, are left to wonder why the Court, which appeared to be chartering a clear course in *Rosebud*, either veered from the course, or "missed the turn" in deciding *Solem*.[22]

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[19] 430 U.S. at 597.

[20] Ute Indian Tribe v. State of Utah, 773 F.2d 1087, 1103 (1985) (Seth, J., dissenting).

[21] The dissenters noted a further inconsistency not only with *Seymour* and *Mattz*, but also with the Court's more recent decision in *DeCoteau*. 430 U.S. at 618 (Marshall, J., dissenting).

[22] Motion of the Counties, *supra* note 7, at 7.

*Solem v. Bartlett*

In *Solem v. Bartlett*, 465 U.S. 463 (1984), a convicted rapist filed a habeas corpus petition. He contended that the situs of the crime (a portion of the Cheyenne River Sioux Reservation opened for settlement by a surplus lands act), was within Indian country, and hence the state court which convicted him was without jurisdiction. The United States District Court for the District of South Dakota issued the writ of habeas corpus, and the U.S. Court of Appeals for the Eighth Circuit affirmed. The Supreme Court, in an opinion authored by Justice Marshall, held that the Cheyenne River Act [Act of May 29, 1908, 35 Stat. 460] which authorized the Secretary of Interior to open 1.6 million acres of the Cheyenne River Sioux Reservation for homesteading, did not diminish the boundaries of the reservation.

The *Solem* court had access to historical data which led to its conclusion that "the Congress that passed the surplus lands acts anticipated the imminent demise of the reservation and, in fact, passed the acts partially to facilitate the process." [23] Nevertheless, the Court, in a quantum leap of logic, concluded that Congress enacted certain surplus land acts which contravened both its general intent and the official policies of the allotment era. For the same players to have enacted statutes with conflicting intent would seem incongruous. Yet in *DeCoteau* and in *Rosebud* (decisions *not* overruled or distinguished in *Solem*), the historical context had been deemed indicative of an intent to diminish and disestablish reservations through passage of the various surplus lands acts.[24]

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[23] 104 S. Ct. at 1165.

[24] *Id.* The position which the court adopted in *Solem* incorporated several arguments which had been advanced by the Solicitor General's office, but rejected in *DeCoteau* and *Rosebud*.



The Court departed from the standards set forth in both *DeCoteau* and *Rosebud*, standards requiring that historical evidence be considered in a broad historical context whein resolving issues of Congressional intent. In contravention of the *Rosebud* standard, the *Solem* court engaged in a very narrow and limited historical inquiry. Rather than relying on historical context to aid in the interpretation of the surplus lands acts, the Court reverted to a variant of "plain meaning" analysis, and concluded, "The most probative evidence of congressional intent is the statutory language used to open the Indian lands." [25]

Ironically, phrases similar to those which had been deemed determinative in the early disestablishment cases were considered by the *Solem* court to be merely "isolated phrases" and "hardly dispositive." [26] Thus, references to the "public domain," once thought to be charged with special significance, were relegated to a class of unoperative terms. In addition, express reference to "reservations thus diminished" were deemed somehow less than "explicit expression(s) of congressional intent to diminish" the Cheyenne River Sioux Reservation.[27] The proper historical perspective of the General Allotment Act, particularly § 5, played absolutely no part in the decision.

In analyzing the circumstances surrounding the passage of the particular surplus land act in question, the Court relied heavily on a historian's manuscript.[28] No attempt was made to read the legislative history of the particular act in question within the historical context of the allot-

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[25] *Id.* at 1166.

[26] *Id.* at 1169.

[27] *Id.*

[28] Hoxie, Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908 (undated manuscript).

ment era, or in concert with other contemporaneous surplus lands acts. In fact, the Court focused more attention on events noted by the historian expert witness which occurred *after* passage of the act, and demographic data compiled decades after its passage, than on historical evidence of legislative intent at the time the 1908 act was passed.[29]

The *Solem* court effectively substituted its analysis of the subsequent events for the *Rosebud* court's required analysis of legislative history and other historical facts, as it purported to resolve issues of congressional intent. The practical effect of such analysis allows courts to substitute their interpretation of modern policy as it should be, for actual, historical legislative intent:

> If courts engage in artificially narrow inquiries into statutory purpose, disregard principles announced in prior decisions, and allow their determinations to be governed by the vagaries of subsequent developments, then they are free to substitute their judgment for that of Congress, indulging in judicial revisionism by conforming statutes to presently accepted values and policy notions. To do so would be to remake history in derogation of the express mandate of *Rosebud* and *DeCoteau*.[30]

In the aftermath of *Solem*, disestablishment cases seem destined to be decided *ad hoc*, on a case-by-case basis,

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[29] 104 S. Ct. at 1167-1170. The approach taken by the court signals a significant departure from its conclusion in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978), that legislation dealing with Indian affairs "cannot be interpreted in isolation but must be read in the light of the common notions of the day and the assumptions of those who drafted them."

[30] 430 U.S. at 615; Motion of the Counties of Dewey, Ziebach and Corson, South Dakota and the County of Sioux, North Dakota for Leave to File Petition for Rehearing and Petition for Rehearing at 18, Solem v. Bartlett, 465 U.S. 463 (1984) [hereinafter Motion of Counties].



with little attempt to provide any consistent interpretation of legislative intent:

> [T]he Court has attempted to reconcile the conflict in the four preceding opinions by essentially holding that the determination in one surplus land act case bears little relation to the next, and that each must be decided on a clean slate. This approach ignores the historical threads binding together these different manifestations of the federal Indian policy of the turn of the century, and hinders any inquiry into true legislative intent.[31]

The state of disestablishment law circa 1985-1986 could perhaps best be characterized as a state of confusion. Looking down "the road" and speculating what the future may hold for disestablishment litigants, one is left to wonder, "Are there no exits from this maze of legal detours and deadends?" Has the Court become so firmly grounded in "literalism" as a basis for statutory construction that despite that chaos which results, it will not deviate from the present case-by-case course? Will the confusion that is exemplified by the most recent disestablishment case, *Utah v. Ute Indian Tribe*, continue to plague this area of the law?

## UTAH V. UTE INDIAN TRIBE: A CRITICAL JUNCTURE IN THE DEVELOPMENT OF DISESTABLISHMENT CASE LAW

The next case in the evolution of judicial standards for determining Congressional intent in disestablishment cases has yet to be decided by the United States Supreme Court. *Utah v. Ute Indian Tribe* has, at this writing, wound its way through federal district court (where a 100-page district court opinion was issued), the U.S. Court of Appeals for the Tenth Circuit, and an *en banc* hearing before the entire panel of Tenth Circuit judges.

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[31] Motion of Counties at 7.

A petition for certiorari has been filed in the hope that the Supreme Court will accept the opportunity to clarify disestablishment issues after *Solem*.[32]

At issue is the continuing or diminished reservation status of the Uncompahgre Reservation and the Uintah Reservation, approximately four million acres. If the *en banc* decision is allowed to stand, the Tenth Circuit will have judicially recreated the second largest Indian reservation, in terms of land area, in the United States.[33]

At the district court level, the court was presented with a voluminous record which included 217 legislative documents and 485 historic documents, 1864-1978. In the trial court's lengthy opinion, a detailed historical analysis was undertaken in the search for Congressional intent. The subsequent decision by the Tenth Circuit *en banc* court largely ignored the vast wealth of historical data available in the trial record, relying on language rather than legislative history, and a strained interpretation of *Solem*, in arriving at its anti-disestablishment decision.

Had the *en banc* majority applied the standards set forth in *DeCoteau* and *Rosebud*, the court, given the historical record at its disposal, should clearly have concluded that the reservation had been disestablished, at least in part. 1) The fact of the legislative act included heretofore powerful reference to "public domain."[34] 2) Surrounding circumstances evidenced an intent to dis-

[32] *See* Utah v. Ute Indian Tribe, *supra* note 3.

[33] Petition for Writ of Cert., Utah v. Ute Indian Tribe, *supra* note 2, at 8.

[34] Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Santa Fe Mining, Inc. in Support of the Petition for Certiorari, Utah v. Ute Indian Tribe, 521 F. Supp. 1072, *aff'd in part and rev'd in part*, 716 F.2d 1298 (10th Cir. 1983), *aff'd in part and rev'd in part, on rehearing en banc*, 773 F.2d 1087 (10th Cir. 1985), *petition for cert. filed*, 55 U.S.L.W. 3071 (U.S. May 5, 1986) (No. 85-1821) at 6, 9. [Hereinafter Santa Fe Amicus Brief].



establish, as did "subsequent events" and demographic information deemed so persuasive in *Solem*. The population and land use of the disputed area is over 90% non-Indian.[35] The federal government had not treated part of the area as an Indian reservation since 1897.[36] The tribe itself had obtained a montary award in its claims action [Ute Indian Tribe v. U.S., 4 Ind. Cl. Comm. 707 (1965)] based on the tribe's allegation that it had "lost the reservation."[37] 3) Documented legislative history also indicated an intent to disestablish.[38]

However, the Tenth Circuit *en banc*, in an expansive reading of *Solem*, concluded (5-2 decision) that despite the unequivocal language of disestablishment the reservations had survived. The *en banc* majority refused to analyze the "surrounding circumstances" and "legislative history" factors which the *Rosebud* court set forth in its standard for interpreting surplus lands enactments.[39] Section 5 of the General Allotment Act was virtually ignored.

The *en banc* decision has further confused an already complicated body of case law. Petitioners make a convincing plea for clarification of disestablishment standards in the aftermath of *Solem*:

> Only this Court can correct the *en banc* majority's misreading of *Solem*, a misreading that not only result in transforming a vast region of the State of Utah into an Indian reservation, but also would threaten to have a similar effect throughout the West-

[35] Petition for Writ of Cert, Utah v. Ute Indian Tribe, *supra* note 2 at 5.

[36] *Id.* at 8, citing Memorandum for the Petitioner in Response to the Motion of the Ute Indian Tribe, at 6, Andrus v. Utah, 446 U.S. 500 (1980) (No. 78-1522) (September 25, 1979).

[37] *Id.* at 9.

[38] *Id.* at 15-30.

[39] *Id.* at 22. See also Santa Fe Amicus Brief, *supra*, note 32.

> ern States in other areas that are not now considered to be Indian reservations. Already the Navajo Tribe of Indians, armed with the decision below, claims that 1.9 million acres in New Mexico, which were "restored to the public domain" in the early 1900's are nevertheless part of an Indian reservation because the *en banc* majority's decision here renders "unsound" the view that such language ends reservation status.[40]

The case has potential ramifications that extend far beyond the immediate controversy in Utah.[41] *Ute* is a critical juncture in the development of disestablishment case law. The Supreme Court, by granting certiorari, could seize the opportunity to provide needed clarification.

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[40] *Id.* at 12.

[41] The Navajo tribe has asserted jurisdiction over 1.9 million acres. Navajo Tribe of Indians v. Satte of New Mexico, U.S. Dist. Ct. No. CIV 82-1148 JB (D.N.M.), *on appeal*, Tenth Circuit Court of Appeals Nos. 84-1418 and 84-1764. The social, economic, and political tensions created when land is "re-established" as reservation land after extended periods of non-Indian settlement were alluded to in Motion of the Counties, *supra* note 7, at 4-5:

> [I]t ought not be the task of the Court to remake history by revising the effect of acts of Congress in order to conform them to modern policy, no matter how tempting such a course might be. Unfortunately, that is just what the Court has undertaken in this case. The result has been the perpetuation of a cruel historical hoax on thousands of innocent homesteaders and their descendants in the Cheyenne River area. These ranchers and farmers now find themselves after the passage of many decades, suddenly thrust into the unenviable status of residents of an Indian reservation, where their elected officials have only limited jurisdiction and where they have no effective voice in the governance of their affairs and property by tribal governments.



## CONCLUSION

If congressional intent determinations in disestablishment cases are to develop into a coherent body of law, two preconditions must be met. First, the Court must adopt and consistently apply a standard for statutory construction. The standard set forth in *DeCoteau* and *Rosebud* provides a ready model. Second, the Court must have access to necessary historical data if the standard adopted includes "legislative history" or "surrounding circumstances" elements.

The second precondition can only be met if historians work with lawyers to compile, analyze, and explain the significance of historical data. The need is great for general research relating to the General Allotment Act, particularly the § 5 surplus lands provisions. In other determinations, as well, historians can aid the courts in providing a proper historical perspective for a fair adjudication of issues relating to Congressional intent.

With proper historical guidance, Courts may be less tempted to adopt a literalist approach to statutory construction that can only deepen the state of confusion that typifies disestablishment adjudications of the recent past.

[Table and Drawing Omitted in Printing]

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1960

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No. 8 Misc.

PAUL SEYMOUR, PETITIONER

v.

MERLE E. SCHNECKLOTH, SUPERINTENDENT
OF WASHINGTON STATE PENITENTIARY

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

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**MEMORANDUM FOR THE UNITED STATES**

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The Court has requested the view of the United States as to whether the lands involved in the above-entitled case are Indian lands.

The record in this case shows the land involved as follows:

> On the southwest corner of 6th Avenue and Jackson Street (formerly 10th Street) in East Omak, Okewogan County, Washington; that said premises are more particularly described as Lot 9, Block 118 of the government townsite of Omak and situated in Section 36, Township 34, North Range, 26 E.N.M.



According to the records of the Department of Interior, this land is not held in a trust status for any Indian nor is it held by an Indian subject to restrictions against alienation. Nevertheless, it is the position of the Department of Interior, with which the Department of Justice agrees, that the land is "Indian country" as that term is defined in 18 U.S.C. 1151.

18 U.S.C. 1151 provides in pertinent part that Indian country means "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." The land here is, in our view, "within the limits" of an Indian reservation.

The Colville Reservation, as originally established by executive order in 1872, was bounded on the north by the international boundary and on the south by the Columbia River. See Royce, *Indian Land Cessions in the United States,* Washington Map 1, No. 536. That part of the original reservation approximating the north half was ceded to the United States and the reservation was diminished to approximately the south half in 1892. See Royce, *op. cit.,* Washington Map 2, No. 717. While it is true that the Act of March 22, 1906, 34 Stat. 80, made provision for allotments on the diminished reservation and authorized the sale and disposition of the unallotted lands subject to payment of the proceeds of the sales to the Indians, this did not destroy the existence of the reservation. The Department of Interior continued to recognize the entire diminished or "south half" as the Colville Reservation. The Act of July 24, 1956, 70 Stat. 626, specifically provides in section 1 that "the undisposed-of lands of the Colville Indian Reservation, Washington, dealt with by the Act of March 22, 1906 (34 Stat. 80), are hereby restored to tribal ownership to be held in trust by the United States to the same extent as

all other tribal lands on the existing reservation, subject to any existing valid rights." Section 2 of that Act, authorizing exchanges to effect land consolidation between Indians and non-Indians in Okawogen County, provides that the "acquisition of lands pursuant to this Act shall be limited to lands within the boundary of the reservation." This seems a clear recognition by Congress that lands opened under the Act of 1906 are still within the existing boundaries of the Colville Reservation.

Since it is the boundaries of the reservation, rather than the fee title to the property, which is controlling under 18 U.S.C. 1151, the land in issue seems to us to be in "Indian Country." Hence, under 18 U.S.C. 1153, the crime of burglary would be punishable by the United States, and not the state.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*

SEPTEMBER 1960.



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

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No. 71-1182

RAYMOND MATTZ, PETITIONER

*v.*

G. RAYMOND ARNETT

---

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST DISTRICT

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## OPINIONS BELOW

The order of the Supreme Court of California denying petitioner's application for review (Pet. App. C) was entered on December 16, 1971. The opinion of the Court of Appeal, First District (Pet. App. A), is reported at 20 Cal. App. 3d 729, 97 Cal. Rptr. 894.

## JURISDICTION

On December 16, 1971, the Supreme Court of California denied petitioner's application for review. A petition for a writ of certiorari was filed with this Court on March 14, 1972, and was granted on January 15, 1973. This Court's jurisdiction rests on 28 U.S.C. 1257(3).

## EXECUTIVE ORDER AND STATUTES INVOLVED

The Executive Order of October 16, 1891, I. Kappler, *Laws and Treaties* 815 (1904), reads as follows:

> It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.
>
> BENJ. HARRISON.

The Act of June 17, 1892, 27 Stat. 52, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: [*Provided,* That any Indian now located upon reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a



> family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: *Provided,* That lands settled upon, improved, and now occupied by setttlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between

settlers the land shall be awarded to the settler first in order of time: *Provided,* That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: *And provided further,* That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further,* That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Approved, June 17, 1892. [Bold type shows language added by Senate amendment of House bill.]

18 U.S.C. 1151 reads as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. 1162 provides in relevant part:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of



> Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| *State or Territory of* | *Indian country affected* |
|---|---|
| * * * * | |
| California | All Indian county within the State. |
| * * * * | |

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; * * * or shall deprive any Indian or Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

The California Fish and Game Code, Section 12300, reads as follows:

> Irrespective of any other provisions of law, the provisions of this code are not applicable to California Indians whose names are inscribed upon the tribal rolls, while on the reservation of such tribe and under those circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States.

## QUESTION PRESENTED

Whether petitioner's fishing nets were seized by the State of California within Indian country as defined by 18 U.S.C. 1151 (62 Stat. 757, as amended by 63 Stat. 94).[1]

## INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's of October 10, 1972, inviting the Solicitor General to express the views of the United States in this case.

## STATEMENT

This action was brought by the respondent, director of the state Department of Fish and Game, for the forfeiture of five nylon gill nets owned by the petitioner on the ground that he used the nets in violation of California's fish and game laws. The nets were seized by a state game warden on September 24, 1969. The nets were stored in open containers upon land owned by a lumber company within 200 feet of the Klamath River on land that had once been part of the Klamath River Reservation and that had been made part of the Hoopa Valley Reservation by Executive Order in 1891 (Pet. App. A, p. 1; Pet. App. B, pp. 4-5).

The petitioner intervened to resist the forfeiture alleging that he is an enrolled Indian of the Yurok (Klamath River) Tribe, that the nets were seized within Indian country as defined by 18 U.S.C. 1151, and that the California law prohibiting use of the nets was therefore inapplicable.

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[1] Having ruled that the land where the nets were seized was not Indian country, the California courts did not reach the issue whether, if the land is Indian country, petitioner is a beneficiary of rights which either are preserved from state regulation by 18 U.S.C. 1162(b), *supra*, or entitle him to the exemption of California Fish and Game Code, Section 12300, *supra*. See Pet. App. A, pp. 1-2.



The trial court held that the land where the nets were seized was not "Indian country" within the scope of 18 U.S.C. 1151 and was not within an Indian reservation within the meaning of California Fish and Game Code, Section 12300, because the Act of June 17, 1892, which had opened the Reservation for public purchase of excess land had, in effect, terminated the twenty miles of the reservation nearest to the Pacific Ocean (Pet. App. B, pp. 1-2). The state Court of Appeal affirmed the decision on the same grounds (Pet. App. A), and the Supreme Court of California denied petitioner's application for review (Pet. App. C). Petitioner then filed a petition for a writ of certiorari in this Court, which granted the petition on January 15, 1973.

## SUMMARY OF ARGUMENT

I. The events leading to the Act of June 17, 1892, show that the Act did not terminate the portion of the Hoopa Valley Reservation to which it applied. The seaward twenty miles of the addition to the Hoopa Valley Reservation had been the Klamath River Reservation. Because of legal problems in maintaining multiple separate reservations, the President, by Executive Order in 1891, had made the Klamath River Reservation part of the Hoopa Valley Reservation. The reference in the 1892 act to "what was the Klamath River Reservation" merely designates the portion of the addition to the Hoopa Valley Reservation that had previously been a separate reservation. It does not indicate a congressional abolition of half of the just created Hoopa addition.

The Act of 1892 can properly be understood only in light of the General Allotment Act which Congress had recently passed. In that Act Congress maintained Indian reservations but permitted allotments of land within reservations to individual Indians and sales of surplus land to non-Indians. The General Allotment Act, however, did not require the President to make allotments within any

particular reservation. Consequently a number of Acts requiring allotments and disposal of surplus land within particular reservations were passed. The 1892 Act was such an Act. Nothing in the Act purports to terminate the part of the reservation to which it applies. When Congress has wished to terminate all or part of a reservation it has done so explicitly.

II. The consistent course of administrative and congressional action subsequent to the Act of 1892 supports the proposition that that Act did not abolish the Klamath River portion of the Reservation. The Department of the Interior, shortly after the passage of the Act, was required to determine whether allotments made under the Act were allotments on or off a reservation. In a carefully reasoned and documented opinion the Department in charge of administering the Act ruled that the Act reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. This has been the consistent view of the Department of the Interior, and has also been the premise on which Congress has subsequently acted.

III. The decisions of this Court has consistently held that Acts opening reservations or parts of reservations for allotment and disposal of surplus land for the benefit of the resident Indians do not thereby abolish the reservations. *Seymour* v. *Superintendent,* 368 U.S. 351, is, in our view, controlling here. The Act of 1906 in question in *Seymour,* 34 Stat. 80, was identical in effect to the Act in question here. This Court held that that statute, while requiring allotment and disposal of surplus land in the Colville Reservation, did not thereby terminate the Reservation. Moreover, although one of the primary purposes of the extension of the Hoopa Valley Reservation was to secure the Indians' fishing rights in the Klamath River, nothing in the 1892 Act purported to terminate those rights. An intent to take such rights without compensation merely by implication should not be presumed.



## ARGUMENT

### I. THE EVENTS LEADING TO THE ACT OF JUNE 17, 1892, 27 STAT. 52, AND THE ACT ITSELF SHOW THAT THE ACT DID NOT TERMINATE THE ADDITION TO THE HOOPA VALLEY RESERVATION CREATED BY EXECUTIVE ORDER ONLY MONTHS BEFORE, ON OCTOBER 16, 1891

#### A. The History of the Establishment of the Reservation

The Yurok Indians historically have been fishing people who live on the lower Klamath River near the Pacific Ocean, the area in question here. See Kroeber, *Handbook of the Indians of California,* p. 1 (1925).[2] Their very name means "downstream" in the language of the adjacent Karok Tribe. Kroeber, *supra,* at p. 15.

On November 16, 1855, as authorized by the Act of March 3, 1855 (10 Stat. 686, 699), President Pierce set apart as an Indian reservation a strip of territory extending along the Klamath River for a width of one mile on each side for a distance of twenty miles inland from the Pacific Ocean. The area is a deep gorge, consisting of craggy timberland rich in redwood and pine with little arable land except at the river bank. The area was chosen because the Indian had always lived there and had depended largely on fish from the Klamath River for their diet and trade.[3]

In his 1861 Annual Report (quoted in 33 I.D. at 216) the Commissioner of Indian Affairs described the Reservation as follows:

> This reservation is well located, and the improvements are suitable and of considerable value. There

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[2] There are excerpts from Kroeber at A. 34-44.

[3] See 1858 Annual Report of the Commissioner of Indian Affairs, p. 286, quoted in *Crichton* v. *Shelton,* 33 Decisions of the Department of the Interior (I.D.) 205, 216. See also 33 I.D. at 205-206.

is an abundance of excellent timber for fencing and all other purposes, and at the mouth of the Klamath river there is a salmon fishery of great value to the Indians.

In 1861 the Klamath river flooded and destroyed many of the Indian villages. This led the Interior Department to attempt a temporary relocation of the Yurok and other Klamath River Indians to a reservation on the Smith River, but few left and most of those soon returned.[4] The Smith River reservation was thereafter abolished.[5]

In 1864 the Hoopa Valley Reservation, a 12-mile square about 50 miles inland from the mouth of the Klamath River, was created by administrative order authorized by the Act of April 8, 1864 (13 Stat. 39) (later confirmed by Executive Order of June 23, 1876, I Kappler, *supra,* at p. 815). Its creation inadvertently cast doubt on the continued *legality* of the Klamath River reservation (not on its occupation or use by Indians). This was so because the Act of April 8, 1864, *supra,* which authorized the President to create new Indian reservations within California, limited the number of new and old reservations to four, and, arguably, the President had exceeded that number. Indeed, in 1889 the Circuit Court for the Northern District of California ruled that because of the President's failure to list the Klamath River Reservation as one of the four, it was no longer legally a reservation. *United States* v. *Forty-Eight Pounds of Rising Star Tea,* 38 Fed. 400.

It was in response to this decision that, in order to preserve the Klamath River Reservation, President Harrison issued the Executive Order of October 16, 1891 (p. 2, *supra*) extending the Hoopa Valley Reservation to the sea in a strip one-mile wide on each side of the Klamath River so as to include the former Klamath River

[4] See *Crichton, supra,* 3 I.D. at 208.

[5] Act of July 27, 1868, 15 Stat. 198, 221.



Reservation. In *Donnelly* v. *United States,* 228 U.S. 243, this Court upheld the validity of the 1891 Executive Order extending the Hoopa Reservation to the sea.[6]

### B. The Act of June 17, 1892 and the General Allotment Act

In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the General Allotment Act (Act of February 8, 1887, 24 Stat. 388) and (2) the changes made in the 1892 Act during the legislative process in order to incorporate Allotment Act provisions in it.

1. By the 1880's and 1890's the Indians in the West had given up vast areas of land, but they still had substantial holdings in the form of reservations, created by treaty, executive order, or statute. During this period there was much pressure on Congress to remove land from these reservations and make it available for settlement and exploitation by non-Indians. But there was also considerable feeling that to do so would violate treaties and generally break faith with the Indians who had been induced to give up larger areas of land and to become peaceful in return for federal protection and the reservations created for them. The General Allotment Act of 1887 was to some extent a congressional compromise of these conflicting pressures and considerations.

The policy of the Act was to continue the reservation system and the trust status of Indian land at least for the time being, but to allot individual tracts to Indians (in trust) which they would be encouraged to farm.

[6] *Donnelly* concerned a crime committed within the "connecting strip" joining the former Hoopa and Klamath River Reservations. The Court consequently did not specifically consider the effect of the Act of 1892. However, it characterized it as "opening" that part of the reservation to "settlement, entry and purchase," 228 U.S. at 253, not as terminating or abolishing it.

When all the land had been allotted and the trusts had expired, the reservation could be abolished.[7] In the meantime, since acreage limitations were put on the allottments,there would usually be surplus land within reservations which could be made available to non-Indians. It was hoped that the resulting juxtaposition of the two races would be edifying to the Indians and encourage them to adopt white ways.[8]

While the General Allotment Act thus permitted the President to make allotments of reservations lands and, with tribal consent, to sell surplus lands, it did not require him to do so. Congress, therefore, occasionally enacted special legislation to assure that a particular reservation would be opened for allotment and non-Indian settlement. The Act of June 17, 1892, at issue in this case, is an example of such legislation.[9]

Because of the General Allotment Act and these special Acts opening land within reservations to settlement, it is common today to have extensive non-Indian holdings within reservations. As we show in point III, *infra,* however, allotments to Indians and sales to non-Indians, whether under the General Allotment Act or special Acts, do not in themselves terminate the reservations or even make the lands therein held by non-Indians cease to be Indian country. *Seymour* v. *Superintendent,* 368 U.S. 351, 357-359; *Ellis* v. *Page,* 351 F.2d 250 (C.A. 10); *State* v. *Molash,* 199 N.W. 2d 591 (Sup. Ct. S.D.).

2. The pressures of non-Indians to obtain some of the land and especially the redwood forests within the

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[7] The original trust period was to be 25 years, but those periods have often been extended. See p. 21, *infra.*

[8] See, generally, United States Department of the Interior, Federal Indian Law, pp. 115-117, 127-129, 776-777 (1958).

[9] The policy of allotment and sale of surplus lands within reservations was repudiated in the Indian Reorganization Act of 1934, 48 Stat. 984 *et seq.,* as amended, 25 U.S.C. 461 *et seq.*



Klamath River Reservation were particularly strong. In 1879, at the request of the Department of the Interior, military forces were used to evict trespassers. Thereafter, the Secretary decided in 1883 to make allotments to Indians living on the reservation, but he revoked the decision because of inadequate surveys and nothing further done at that time to make allotments or authorize white settlement.[10] In October 1891, the President reaffirmed the existence of the reservation by his Executive Order incorporating it into an extension of the Hoopa Valley Reservation (see p. 2, *supra*).

House Bill, H.R. 38, 52d Cong., 1st Sess., which after amendment became the Act of 1892 at issue here, was reported out of committee on February 5, 1892[11] and was passed by the House on March 1, 1892,[12] only months after the President had reaffirmed the existence of the reservation. The apparent purpose of the House Bill[13] was to seek to open the reservation to non-Indian interests without raising too much opposition. Its language did not purport to terminate the Reservation (the Hoopa extension) just created by the President, and it did not purport to "diminish" the Reservation. Nor did it call for the removal of the Indians.

The bill first designates, as the area to which it applied, what was "Klamath River Reservation"—thus only the seaward portion of the just created extension of the Hoopa Valley Reservation. The bill opened the designated portion of the Reservation for settlement under the homestead, mineral and timber laws. However, it

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[10] See Annual Report of the Commissioner of Indian Affairs for 1885, quoted in part in *Crichton, supra,* 33 I.D. at 214.

[11] H. Rept. No. 161, 52d Cong., 1st Sess.

[12] 23 Cong. Rec. 1598-1599.

[13] At pages 2-3, *supra,* we have set forth the 1892 Act with the House language in normal type and the language added by the Senate in bold type.

recognized that there were both Indian villages and settlements within that part of the reservation and authorized the Secretary of the Interior to set those apart for permanent use by the Indians. The bill provided for confirmation of title for non-Indians who had settled on reservation land not constituting Indian villages or communities, and specified that the funds derived from the sale of the land "shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children." The House bill thus recognized a continuing Indian community and a continuing federal responsibility for Indians living in this portion of the reservation.

The Senate, however, was not satisfied that the House bill adequately protected Indian interests; it amended the bill and called for a conference with the House. 23 Cong. Rec. 3918-3919. As a result of the Senate amendment, the first two provisos of the Act were added (see p. 3, *supra*, bold type). In these provisos the area in question is referred to as a "reservation" and "any Indian now located upon said reservation" is permitted to "apply to the Secretary of the Interior for an allotment of land for himself and * * * for the members of his family, under the provisions of * * * [the General Allotment Act]." In other words, the Senate, dissatisfied with the House bill, which would have allowed non-Indian settlement without first providing for Indian allotments, brought the Act into line with the General Allotment Act, with the difference that Congress ordered the opening rather than leaving it to the President with the consent of the Indians.[14]

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[14] Senator Dawes, the author of the General Allotment Act, sat on the Conference Committee. See 32 Cong. Rec. 3919. Because the House bill was significantly amended in the Senate and in the Conference Committee before it was enacted, respondent errs in relying (Br. pp. 5-7) on statements in the House Report accompanying that bill which do not reflect the amendments designed to protect the interests of Indians living on the Reservation. Those amendments are inconsistent with the statements in the House Report (and with isolated similar statements by individuals during the floor debates) that the Klamath River area was no longer being used as a reservation—a statement as to which the Department of the Interior later declared "the committee was apparently mistaken * * *" (*Crichton, supra*, 33 I.D. at 214). Moreover, although the House Report is dated more than 5 months after the Executive Order establishing the extension of the Hoopa Valley Reservation (see p. 15, *supra*), it makes no mention of this highly significant Presidential action affecting the land and people in question.



Nothing in the Act, or even in the House bill, purports to abolish the Reservation. The reference in the Act to "what was the Klamath River Reservation" merely identifies the part of the extension of the Hoopa Valley Reservation to which the Act applied (see p. 15, *supra*). The court below erred in relying on this descriptive designation as indicating abolition of the Reservation. When Congress has wished to abolish an Indian reservation, it has used direct and unambiguous language to accomplish that purpose. For example, when Congress abolished the nearby Smith River Reservation it stated: [T]he Smith River reservation is hereby discontinued." 15 Stat. 221. And when several Oklahoma Reservations were abolished, the tribes agreed to " 'cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation' all their claim in and to the lands embraced within the designated reservation." *Ellis* v. *Page*, 351 F.2d 250, 252 (C.A. 10).

In another example, Congress specified:

> [T]he reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished. 33 Stat. 218.

See also 68 State. 250 (providing for the abolition of the Menominee Reservation): *State* v. *Molash*, 199 N.W. 2d, 591 (Sup. Ct. S.D).; *Leech Lake Band* v. *Herbst*, 334 F. Supp. 1001 (D. Minn.)

The contrast of these statutory provisions with the Act at issue here is highly significant—particularly in light of the 1892 Act's provisions recognizing that Indians individually and in villages and communities would continue to live in the area and would continue to be under federal protection (see p. 4, *supra*).[15]

And there is nothing in the Act suggesting any loss of fishing rights for the Indian residents of the area or diminution of federal jurisdiction over the area.

## II. THE CONSISTENT COURSE OF ADMINISTRATIVE AND CONGRESSIONAL ACTION SUBSEQUENT TO THE ACT OF JUNE 17, 1892, SUPPORTS THE PROPOSITION THAT THE ACT DID NOT ABOLISH THE KLAMATH RIVER PORTION OF THE 1891 EXTENSION OF THE HOOPA VALLEY RESERVATION

Interpretation of a law by the government agency responsible to administer it is entitled to great weight. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434; *Udall* v. *Tallman*, 380 U.S. 1, 16. The consistent course

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[15] In 1893, pursuant to the 1892 Act and the General Allotment Act, 161 allotments were granted to Indians residing on the Klamath River part of the Hoopa Extension, thus demonstrating a sizeable Indian community at the time the Act was passed. These allotments averaged 60 acres each, totaling 9,762 acres, 40% of the approximately 25,000 acres of the part of the reservation opened for settlement. Finding of Fact No. 83, p. 57, Report of Commissioner in *Jessie Short, et al.* v. *United States*, C.Cls. No. 102-63. At the trial of the present case evidence was submitted showing that petitioner's mother holds such an allotment and that his fishing was in the close vicinity of that allotment (A. 28-31).

In *Jessie Short*, pending in the United States Court of Claims, the issue is whether the joining of the two reservations gave all Indians residing therein rights in the whole or whether each group has rights only within its original portion. Neither the United States nor the other parties to that suit contest the continued existence of the whole as an Indian reservation though the decision of the California court of appeal in this case is, of course, noted.



of administrative interpretation by the Department of the Interior has been, and remains, that the Klamath River Reservation was not abolished by the 1892 Act and still survives.

In 1904 the Department of the Interior was required to rule on whether an allotment made in the Klamath River Reservation portion of the Hoopa Extension under the Act of June 17, 1892, was an allotment within an Indian reservation or outside a reservation. *Crichton* v. *Shelton*, 33 I.D. 205. The question of the survival of the Reservation after the 1892 Act was squarely presented. In a carefully reasoned and fully documented opinion, the Department ruled that the challenged allotments were allotments on a reservation, and that the 1892 Act, in authorizing such allotments, reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. 33 I.D. at 219-220. This contemporaneous interpretation of the 1892 Act was rendered, not by the Bureau of Indian Affairs, but by the Department of the Interior—the Department charged with administering the Act both as to Indians (through the Bureau of Indian Affairs), and as to non-Indian settlers (through the Land Office).

The opinion is significant not only for its holding, but also for the thorough factual and historical background it set forth at a time when the events were less remote. Of particular importance here is the opinion's carefully documented statement that (33 I.D. at 217):

> * * * the lands within the reservation are peculiarly adapted to the purposes for which it was set apart, reference being had to the location of said lands and the habits and necessities of the Indians [occupying them]. There is little question that the prevailing motive for setting apart the reservation was to secure to the Indians the fishing privileges of the Klamath River. * * *

Testimony at a congressional hearing held in 1932 [16] confirms that the Department of the Interior still considered the seaward twenty miles of the Klamath River to be an Indian reservation. O. M. Boggess, Superintendent (for 12 years) of the Department's Hoopa Indian Agency, in a statement taken at Hoopa California, September 24, 1932, testified (A. 14):

> Mr. BOGGESS. This reservation is 12 miles square and then there is an extension 1 mile on each side for an additional 50 miles down the Klamath River to the east [sic] coast.
>
> Senator FRAZIER. Is it all connected?
>
> Mr. BOGGESS. Yes; and it is all classed by the Indian Office as one reservation.
>
> Senator FRAZIER. What do they call this reservation?
>
> Mr. BOGGESS. They call it the Hoopa, and the mile strips they call the Klamath.

The Department of the Interior today administers the entire 1891 extension to the Hoopa Valley Reservation as an Indian reservation. See note 15, *supra*.[17]

Moreover, after it authorized entry to surplus lands in the 1892 Act, Congress also continued to treat the Klamath River Reservation as an existing reservation. Indians had continued to live on this part of the Hoopa Extension (as they do today), but the trust period on their allotments had expired in 1919. Instead of considering its responsibilities terminated in this area, Congress in the Act of December 24, 1942, 56 Stat. 1081,

[16] 72d Congress, *Survey of Conditions of the Indians in the United States*, Part 29, California, U.S. Printing Office 1934. See A. 12-16.

[17] See, also, map of Indian Land Areas published by the Department of the Interior in 1971, which we have lodged with the Clerk of this Court.



25 U.S.C. 348a, extended "The period of trust on lands allotted to Indians of the Klamath River Reservation * * *," reimposing "the trust on certain lands allotted to Indians of the Klamath River Reservation, California." And in the Act of May 19, 1958, 72 Stat. 121, Congress restored to tribal ownership 159.57 acres of "vacant and undisposed-of-ceded lands * * * on the following named Indian reservations * * * : Klamath River, California * * *." Compare *Seymour* v. *Superintendent*, 368 U.S. 351, 356.

## III. THIS COURT'S DECISIONS INDICATE THAT THE FOREGOING CONSIDERATIONS ESTABLISH THE CONTINUED EXISTENCE OF THE RESERVATION

1. The Act of June 17, 1892, is only one of many Acts which between 1887 and approximately 1913 opened Indian reservations for allotments to individual Indians and settlement of surplus lands by non-Indians.[18] These Acts are modifications of the General Allotment Act designed to apply to specific reservations. While they vary in detail, they rather uniformly provide for allotments to individual Indians within the reservation, make surplus land available to homesteaders, and provide that the proceeds from the disposition of the surplus lands will be used for the benefit of Indians on the reservation. The question whether such Acts make either land allotted to Indians or land patented to non-Indians no longer Indian country has been before the courts many times and has been addressed by Congress in defining Indian

[18] See, *e.g.*, Act of March 2, 1889, 25 Stat. 888 (Sioux Reservations), *United States* v. *Nice*, 241 U.S. 591; Act of March 22, 1906, 34 Stat. 80 (Colville Reservation), *Seymour* v. *Superintendent*, 368 U.S. 351; Act of May 29, 1908, 35 Stat. 460 (Cheyenne River Reservation), *United States ex rel. Condon* v. *Erickson*, 344 F. Supp. 777 (D. S.D.): Act of June 1, 1910, 36 Stat. 455 (Fort Berthold Reservation), *The City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (C.A. 8); Act of February 14, 1913, 37 Stat. 675 (Standing Rock Reservation), *State* v. *Molash*, 199 N.W.2d 591 (Sup. Ct. S.D.).

country in 18 U.S.C. 1151, pp. 4-5, *supra*. Both before and after the enactment of 18 U.S.C. 1151, this Court has consistently held that neither allotment nor sale of land within a reservation terminates the reservation.

In *United States* v. *Celestine*, 215 U.S. 278, the Court had to decide whether various patents of land made within a reservation precluded federal jurisdiction over a murder that might have occurred on patented land. The Court held (*id.* at 284):

> That the offense was committed within the limits of the Tulalip Indian Reservation is distinctly charged in the indictment and not challenged in the plea in bar. Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also patented, both tracts remained within the reservation until Congress excluded them therefrom.

The general principles stated by the Court was that "* * * when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Id.* at 285. The Court held that the patenting of allotments on the reservation to individual Indians did not constitute such separation and did not terminate the reservation.

Several years later in *United States* v. *Nice*, 241 U.S. 591, the Court was called upon to interpret the Act of March 2, 1889, 25 Stat. 888, which, similarly to the Act at issue here, required allotments to be made within various Sioux reservations in accordance with the General Allotment Act and which authorized the Secretary of the Interior, with the consent of the tribe, to sell surplus land after the allotments had been made. The Court held that this Act did not terminate the reservation, since both the General Allotment Act and the Act in question "disclosed



that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relations of Indians having allotments under the Act was recognized during the trust period as still continuing." 241 U.S. at 596-597. See also *Wilbur* v. *United States*, 281 U.S. 206.

This Court's more recent decision in *Seymour* v. *Superintendent*, 368 U.S. 351, is, in our view, controlling here. The 1906 Act in question in *Seymour*, 34 Stat. 80, was identical in effect to the Act in question here. That Act (1) provided for allotments to Indians under the provisions of the General Allotment Act (Sec. 2); (2) required that surplus land be made available for homesteading (Sec. 3); (3) required that surplus land not settled by homestead be sold at auction (*ibid.*); and (4) provided that the proceeds received from homesteading and sale be used for the benefit of the Indians remaining on the reservation (Sec. 6). In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservation or "restoring that land to the public domain" (368 U.S. at 355) and the Act's requirement that the proceeds of sales of the land be used for the benefit of the Indians (*id.* at 355-356). The Court also relied on the subsequent interpretation of the Act by the Department of the Interior (*id.* at 357) and the subsequent congressional restoration to the tribe of undisposed of lands within the reservation (*id.* at 356).[19] All of these factors, which were controlling in *Seymour*, are also present, and equally controlling, here.

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[19] The Court in *Seymour* also rejected the State's alternative contention that the reservation, if not totally abolished, had at least been diminished to the extent of actual purchases of lands within it by non-Indians. The Court held this contention inconsistent with the definition of Indian country in 18 U.S.C. 1151 as including "'all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent * * *.'" 368 U.S. at 357-358.

2. We note also that no mention is made in the Act of June 17, 1892, of depriving the Indians of the Hoopa Valley Reservation Extension of either their ownership of the river bed or their fishing rights.[20]

In *Donnelly* v. *United States,* 228 U.S. 243, 259, this Court held that the river bed was part of that Reservation and emphasized the importance of fishing to Indian life as follows:

> Does the reservation include the bed of the Klamath River? The descriptive words of the order are "a tract of country one mile in width on each side of the Klamath River and extending," etc. It seems to us clear that if the United States was the owner of the river bed,[21] a reasonable construction of *this language requires that the river be considered as included within the reservation.* Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time exclude the river. *As a matter of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing.* The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described as running in a narrow canyon through a broken

[20] After extensive hearings in 1964 the Senate let die in committee two proposals to terminate Indian fishing rights on the West Coast, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, on S. J. Res. 170 and S. J. Res. 171, 88th Cong., 2d Sess. And Congress in 18 U.S.C. 1162(b) (p. 5, *supra*) in granting criminal and civil jurisdiction over Indian country to certain States specifically excepted federally protected fishing rights.

[21] The Court held that it was. *Id.* at 264.



> country, the Indians as dwelling in small villages close to its banks. [Emphasis added.]

See also *Metlakatla Indians* v. *Egan,* 369 U.S. 45; *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620.

The obvious intent of specifically including the riverbed and shore in the Hoopa Extension (Executive Order of October 16, 1891) was to protect the right of the Indians to fish. Nothing in the Act of 1892 purported to terminate the Tribes' ownership of the riverbed or their fishing rights. An intent to take such rights without compensation merely by implication should not be presumed. *Menominee Tribe* v. *United States,* 391 U.S. 404. See also *Kennerly* v. *District Court of Montana,* 400 U.S. 423.

## CONCLUSION

The judgment of the California Court of Appeal should be reversed and the case should be remanded for determination of the issues not reached by the courts below.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

KENT FRIZZELL,
*Assistant Attorney General.*

HARRY R. SACHSE,
*Assistant to the Solicitor General.*

CARL STRASS,
GLEN R. GOODSELL,
*Attorneys.*

MARCH 1973.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

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No. 73-1148

IN THE MATTER OF THE APPLICATION OF
CHERYL SPIDER DECOTEAU, PETITIONER

*v.*

THE DISTRICT COURT FOR THE
TENTH JUDICIAL DISTRICT

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*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA*

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No. 73-1500

DON R. ERICKSON, WARDEN, SOUTH DAKOTA
STATE PENITENTIARY, PETITIONER

*v.*

JOHN LEE FEATHER, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## QUESTION PRESENTED

Whether the Act of March 3, 1891, opening land within the Lake Traverse Indian Reservation to non-Indian settlement, granted the State of South Dakota criminal and domestic relations jurisdiction over members of the Sisseton-Wahpeton Sioux Tribe with respect to acts done on such land patented to non-Indians.[1]

## TREATY AND STATUTE INVOLVED

The Treaty of February 19, 1867, 15 Stat. 505, is set forth in the Brief for Petitioner in *DeCoteau* at App. 1-6.

The pertinent provisions of the Act of March 3, 1891, 26 Stat. 989, are set forth in the Brief for Petitioner in *DeCoteau* at App. 7-15.

## STATEMENT

This brief supplements the memorandum submitted in response to the Court's order of April 29, 1974, inviting the Solicitor General to express the views of the United States in *DeCoteau* v. *The District County Court*, and expresses the views of the United States in the closely related case of *Erickson* v. *Feather*; *certiorari* was granted in both cases on June 3, 1974.

### 1. DeCoteau v. District County Court (No. 73-1148)

In December 1971, the State of South Dakota brought dependency and neglect proceedings in the District Court

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[1] It is common ground that, since South Dakota is not a "Public Law 280 State" by original designation or subsequent election (see Act of August 15, 1953, 67 Stat. 588: 18 U.S.C. 1162; 28 U.S.C. 1360), the State lacks civil and criminal jurisdiction over Indians within the boundaries of a subsisting reservation, regardless of whether the acts occurred on Indian trust lands or lands patented to non-Indians. See 18 U.S.C. 1151. Accordingly, the question presented might be more simply stated as: Whether the boundaries of the Lake Traverse Indian Reservation remain as originally established by the Treaty of 1867.

for the Tenth Judicial District of South Dakota against petitioner DeCoteau, an enrolled member of the Sisseton-Whapeton Sioux Tribe, seeking to terminate her parental authority over her minor children, Robert Lee Feather and Herbert John Spider, also enrolled members of the Tribe. The parties stipulated that all of the facts giving rise to the court's order occurred within the boundaries of the Lake Traverse Reservation, as established under the Treaty of February 19, 1867, *supra,* approximately half on allotted Indian land, and the other half on land patented to non-Indians (Decoteau, Pet. App. A, 2a; Pet. App. B, 9a). Both children were placed in foster homes by the county court.

On August 4, 1972, Mrs. DeCoteau moved in the county court for dismissal of the proceedings and return of her children to her on the ground that all the incidents giving rise to the proceedings involved Indians and occurred on the Reservation and that the court therefore lacked jurisdiction. The county court denied the motion.

Mrs. DeCoteau then petitioned in the South Dakota Circuit Court for the Fifth Judicial Circuit for a writ of habeas corpus. That court denied the writ (DeCoteau, Pet. App. B). While it found that Mrs. DeCoteau and the two children are enrolled members of the Sisseton-Wahpeton Sioux Tribe (DeCoteau, Pet. App. B, 8a), it ruled that the county court had jurisdiction to entertain the dependency and neglect proceedings because some of the alleged incidents occurred on non-Indian owned land within the original boundaries of the Reservation, and, in the court's view, "the non-Indian patented land * * * is not within the Indian Country" (DeCoteau, Pet. App. B, 10a).

The Supreme Court of the State of South Dakota affirmed (DeCoteau, Pet. App. A). It held that the effect of the agrement between the United States and the Tribe dated December 12, 1889, and the Act of March 3, 1891, 26 Stat. 989, 1036, ratifying that agreement, was



to separate from the Reservation all lands not allotted to Indians, and, because some of the incidents occurred on such land, the State courts had jurisdiction over the family relationships at issue.

**2. Erickson v. Feather, et al. (No. 73-1500)**

The ten respondents in this case are all enrolled members of the Sisseton-Wahpeton Indian Tribe. They were all tried and convicted in the courts of South Dakota for alleged crimes committed within the Treaty boundaries of the Lake Traverse Reservation, but not upon trust land. At the time this suit was instituted they were incarcerated in the South Dakota State Penitentiary (Erickson, Pet. App. A, 3a). They petitioned in the United States district court in South Dakota for writs of habeas corpus on the ground that the State of South Dakota did not have jurisdiction to try, convict, and sentence them because their alleged criminal acts took place within the boundaries of the Lake Traverse Reservation (Erickson, Pet. 2). The district court, on stipulation that "the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land * * *," denied the writs (Erickson, Pet. App. B, 10a-19a).

The Court of Appeals for the Eighth Circuit reversed (Erickson, Pet. App. A, 7a-9a). After reviewing the decisions of this Court, and its prior decisions on the effect of opening reservations to non-Indian settlement, the court stated (*id.* at 6a):

> The case before us is not unlike *Seymour* [v. *Superintendent,* 368 U.S. 351], *Mattz* [v. *Arnett,* 412 U.S. 481] and *Condon* [*United States ex rel. Condon* v. *Erickson,* 478 F. 2d 684 (C.A. 8)]. The overall climate of legislative activity concerning Indian reservations during the period from 1887 through 1910 received its primary impetus from the General Allotment Act. See *Cohen, supra* at 78-80,

(§§ 11-13). The 1891 Act, by its express terms, refers to the General Allotment Act of 1887. Just as in the beforementioned three cases, the reservation here was not sold to the government outright but merely opened for settlement under the homestead laws and the 1887 general allotment plan. Allotment and homesteading do not suggest congressional purpose to terminate the reservation. *Seymour, supra.*

The Court found no evidence in the 1891 Act's legislative history of a congressional intent to do other than open the Reservation for non-Indian settlement (Erickson, Pet. App. A, 8a), and noted that the State Supreme Court had recently denied state jurisdiction in a similar situation in *State* v. *Molash,* 199 N.W. 2d 591. The court of appeals concluded that the boundaries of the Lake Traverse Reservation remain as established by treaty and the State of South Dakota had no jurisdiction to try the respondents (Erickson, Pet. App. A, 8a-9a).

### 3. The Reservation and the Tribe

The Sisseton and Wahpeton Sioux were a portion of the Sioux Nation who, in the Sioux outbreaks of 1862, did not rebel against the United States. Some "freely perilled their lives during that outbreak to rescue the residents of the Sioux reservation, and to obtain possession of white women and children made captives by the hostile bands." Others fled, "fearing the indiscriminate vengance of the whites" (Treaty of February 19, 1867; DeCoteau, Pet. Br. App. 1).

In 1867 the United States made a treaty with the Sisseton-Wahpeton Tribes in which the Tribes "cede[d] to the United States the right to construct wagon-roads, railroads * * * and other such public improvements * * * across the lands claimed by said bands (including their reservation as hereinafter designated) * * *" (*id.* at 2; Art. 2). In consideration for the cessions made and services rendered by the Tribes, the United States established for these Tribes "as a permanent reservation" a triangular tract of land that became known as the Lake Traverse Reservation (*id.* at 3; Art. 3).[2] The Treaty further provided (*id.* at 6; Art. 10):



> The chiefs and head-men located upon either of the reservations[3] set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: *Provided,* That all rules, regulations, or laws adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent.

On December 12, 1889 the Sisseton-Wahpeton Sioux entered into an agreement with the United States providing that, in accordance with the Act of February 8, 1887 (the General Allotment Act, 24 Stat. 388), the Tribes do (DeCoteau, Pet. Br. App. 8):

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[2] In connection with our brief *amicus curiae* in *Antoine* v. *The State of Washington,* No. 73-717, this Term, we lodged with the Clerk copies of the U.S. Department of the Interior, Bureau of Indian Affairs Map, "Indian Lands and Related Facilities as of 1971." That map shows the Lake Traverse Reservation at issue here. We are supplying copies of the map to counsel herein. We have also appended to this brief a diagram sowing the location of trust and tribal lands within the Reservation. This diagram is taken from a more detailed but bulky map prepared by the Bureau of Indian Affairs which we are lodging with the Clerk.

[3] Article 4 of the Treaty also established the Devil's Lake Reservation in North Dakota.

> * * * hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservaiton set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

The agreement also provides that, in addition to certain settlements of past claims and indemnities, the Indians shall receive $2.50 for each acre of land conveyed, to be deposited in the Treasury and used "for the education and civilization of the said bands of Indians * * * as provided in section five [of the General Allotment Act of 1887] * * *" )*id.* at 9).[4]

The ratifying Act of March 3, 1891, after reciting the Agreement in full, provides, among other things, that the land ceded by the Indians shall be—

> subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *. [*id.* at 15.]

In accordance with the Act of 1891 a large amount of land within the Reservation was patented to non-Indians. A large amount also remains Indian trust land. The State Circuit Court in *DeCoteau* found as a fact (DeCoteau, Pet. App. B, 9a, finding IX):

> That lots or tracts of non-Indian patented or deeded land and lots or tracts of unpatented Indian trust land are interspersed in a crazy-quilt pattern

[4] The Agreement provided that the money was to earn interest at 3% and be available for appropriation by Congress. The 1891 Act raised the interest rate to 5% and authorized the President, without further congressional action, to use any part of the funds for the "education and civilization" of the Tribe (*id.* at 14).



> over the entire area within the boundaries of the Lake Traverse Indian Reservation as established by the treaty of February 19, 1867.

The Sisseton-Wahpeton Sioux Tribe has ~~remcained~~ remained a major Indian Tribe. Its present enrolled membership is 6,010, of whom 3,200 live on or near the Lake Traverse Reservation. The Tribe has a Constitution and by-laws approved by the Secretary of the Interior. In addition to having an active tribal government, it operates, with federal assistance, its own police force (presently 14 persons) and maintains a tribal court with two judges and various other personnel.[5]

It is the position of the United States, in accord with the decision of the Eighth Circuit in *Erickson,* that the Act of March 3, 1891, did not disestablish the Lake Traverse Indian Reservation and that the State of South Dakota is without jurisdiction over the domestic affairs or alleged criminal acts of Indians arising within the boundaries of the Reservation as established by the Treaty of February 19, 1867.

## SUMMARY OF ARGUMENT

The essential question presented by these cases is whether the Act of March 3, 1891, by which unallotted land within the Lake Traverse Reservation was opened for settlement by non-Indians, removed that land from the Reservation. In approaching the question it is important to bear in mind that an Indian reservation does not connote total Indian or federal ownership of the land within it. It refers to a geographical area within which the legislative authority of the Tribe functions and the area within which federal rather than state criminal jurisdiction applies in matters affecting Indians.

[5] Information supplied by the Sisseton-Wahpeton Agency of the Bureau of Indian Affairs.

The 1891 Act did not specifically change the boundaries of the Reservation or return land to the public domain, and its repeated references to the General Allotment Act show that Congress intended no more than to "open" the Reservation for non-Indian settlement. This Court's decisions in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnett*, 412 U.S. 481, show that this limited purpose is consistent only within preservation of the Reservation as a jurisdictional unit. The special provisions of the Act as to the 16th and 36th sections also show that Congress did not regard the opening of the Reservation as altering its boundaries.

Subsequent administrative and legislative actions confirm that the 1891 Act did not disestablish the boundaries of the Reservation. The President, in proclaiming the availability of lands for settlement after passage of the Act, described them as "lands embraced in said reservation" and "lands within the Lake Traverse Reservation opened to settlement" (*infra*, p. 22). And the Department of the Interior has held the boundaries of the Reservation to be unaffected by the 1891 Act. Recently Congress has authorized the Secretary of the Interior to purchase lands "within the boundaries of the Lake Traverse Reservation" for the use of the Tribe and has restored to the Tribe certain federal lands within the Reservation. These acts strongly affirm the continued existence of the Reservation as a unit of federal and Indian jurisdiction.

Moreover, given the scattering of trust lands throughout the Reservation, the State's position would be destructive of law and order on the Reservation. Since the State here (being a non-Public Law 280 State) can assert no jurisdiction over Indians on trust lands, federal and trival jurisdiction over Indians everywhere within the Reservation's treaty boundaries is required for effective law enforcement.

Similarly, the Tribes' civil jurisdiction over the Reservation Indians, a basic part of tribal self-government,



should not depend on the title to the lot within the Reservation where a particular act takes place. There is no reason to believe that Congress intended so to impede the Tribe's right to govern its own people. Accordingly, the judgment of the Eighth Circuit in *Erickson* should be affirmed, and the judgment of the Supreme Court of South Dakota in *DeCoteau* should be reversed.

## ARGUMENT

### I

### THE ACT OF MARCH 3, 1891, DID NOT ALTER THE BOUNDARIES OF THE RESERVATION AS ESTABLISHED IN THE TREATY OF FEBRUARY 19, 1867

Article 3 of the Treaty of February 19, 1867 (DeCoteau, Pet. Br. App. 3), granted the Sisseton and Wahpeton Sioux Indians a permanent Reservation with definite boundaries. Article 10 of that treaty (*id* at 6) granted the Tribes within the Reservation the right to make their own laws and be governed by them, subject to the supervision of the United States. The basic question in this case is whether the Act of March 3, 1891, which clearly permitted non-Indian settlement within the Reservation, also altered the boundaries of the Reservation. In considering that issue we must remember that an Indian reservation does not connote total Indian or federal ownership of the land within it. It refers to a geographical area within which the legislative authority of a tribe functions. *Worcester* v. *Georgia*, 6 Pet. 515; *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164. It also describes the area within which federal criminal jurisdiction in matters affecting Indian applies, 18 U.S.C. 1151, and the area within which services of the Bureau of Indian Affairs are primarily directed, *Morton* v. *Ruiz*, 415 U.S. 199. Accordingly, the fact that portions of the land within the Reservation are owned by non-Indians is immaterial. The controlling question is whether Congress

deliberately terminated or changed the boundaries of the Reservation by the Act of 1891.

**1. The General Scheme of the 1891 Act Suggests No Change in the Reservation's Boundaries**

The 1891 Act begins by ratifying and quoting in full the 1889 Agreement made between the Tribe and the United States. The Agreement, in its preamble, twice states that it is made under the authority of the Act of February 8, 1887, the General Allotment Act, and quotes from that Act the language which authorizes the President, after allotments have been made, to negotiate with Indian tribes for the sale of their unallotted lands (*DeCoteau*, Pet. App. C, 13a). The Agreement then specifically provides for the sale of the unallotted land of this Tribe *"within the limits of the reservation"* (*id.* at 14a; emphasis added), and directs that the payment shall be deposited in the Treasury to be appropriated by Congress for the "education and civilization" of the Indians (*ibid.*). The Act of 1891 added to the agreement a further reference to the General Allotment Act (*id.* at 19a, sec. 29) and the proviso that the lands ceded shall:

> be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located. [*Id.* at 20a.] [6]

[6] The background of the negotiation of the 1889 Agreement and the enactment of the 1891 Act are exhaustively set out in the brief of respondent. In our view, essentially two points are established: first, the non-Indian inhabitants of South Dakota intensely desired the opening of the Lake Traverse Reservation for settlement by non-Indians (see DeCoteau, Resp. Br., 16); second, the Tribe, which had endured four years of drought, was badly in need of money. See E. Ex. Doc. No. 66, 51st Cong., 1st Sess., p. 19. Neither of these facts, however, in any way implies that the boundaries of the Reservation had to be or were reduced. Indeed, the only money immediately paid to the Tribe was not part of the consideration for the lands "ceded" but about $500,000 conceded to be due for scout services and a cancelled annuity. For the future, the Indians expected to have expended on their behalf the interest on the amount nominally deposited in the Treasury in "payment" for the land, approximately $80,000 annually (when the interest rate was raised to 5%).



Several things are immediately apparent. The negotiation with the Indians, the allotments to them, and the cession made by them are expressly made under the authority of the General Allotment Act. The boundaries of the Reservation are not expressly altered and no separately described portion of the Reservation is vacated, returned to the public domain, or set aside for settlement. The government is not free to use the opened land for any purpose, but only for homesteading, townsites and school land. The tribal relationship is expressly continued and monies from the sale of the land are not distributed but are kept in trust to be appropriated by Congress or applied by order of the President for the "education and civilization" of the "bands of Indians or member thereof" (*id.* at 19a). Thus, on the face of the statute, it does not appear that Congress intended to change the boundaries of the Lake Traverse Reservation.

**2. The References to the General Allotment Act Show the Reservation Was Maintained**

Both the 1889 Agreement and 1891 Act were adopted pursuant to the General Allotment Act of 1887. The philosophy of the latter Act was succinctly stated in *Mattz* v. *Arnett*, 412 U.S. 481, 496:

> [The General Allotment Act] permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to

allot tracts to individual Indians for agriculture and grazing.

It was not the purpose of the General Allotment Act to divde reservations into a scattering of land under federal jurisdiction and a scattering under state jurisdiction. *Seymour* v. *Superintendent*, 368 U.S. 351, 357-358. Rather, as this Court stated in *Mattz, supra*, 412 U.S. at 497, quoting from *Seymour, supra*:

> "The Act did no more [in this respect] than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."

Nor was it the intent of the General Allotment Act to disturb tribal relations prior to the time that the trust status of allotments should be abolished. In *United States* v. *Nice*, 241 U.S. 591, 596-597, the Court stated:

> [The General Allotment Act] disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relation of Indians having allotments under the act was recognized during the trust period as still continuing.

In sum, while the General Allotment Act of 1887 provided for some settlement of non-Indians within reservations, the congressional intent was to continue the reservation system and to maintain established relations with the Tribes and federal trust responsibility over the reservations until these protections were no longer necessary. The 1889 Agreement and 1891 Act were adopted in conformity with this policy and should not be held to have tacitly abolished or diminished the Reservation here in question.



**3. The Absence of Language in the 1891 Act Expressly Altering the Boundaries of the Reservation or Returning Land to the Public Domain Shows That the Reservation Boundaries Were Not Altered**

In *Mattz* v. *Arnett, supra*, this Court stated (412 U.S. at 504-505; footnote omitted):

> Congress [in 1892] was fully aware of the means by which termination could be effected. * * * The Court stated in *United States* v. *Celestine*, 215 U.S., at 285, that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. See *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *Nice*, 241 U.S. 591 (1916).

In a footnote, the Court gave the following examples of termination language [*Mattz, supra*, 412 U.S. at 504, n. 22]:

1. 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued").
2. 27 Stat. 63 (1892) (* * * the North Half of the Colville Indian Reservation] "the same being a portion of the Colville Indian Reservation * * * be, and is hereby vacated and restored to the public domain").
3. 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same hereby abolished").

There is no such language in the 1891 Act at issue here. The Reservation is not discontinued. A discrete portion of it is not "vacated and restored to the public domain." The reservation lines are not abolished.

Moreover, to read into the language opening unallotted lands for settlement an intent to remove them from the Reservation would inevitably create a reservation with crazy quilt boundaries, a result that both Congress (see 18 U.S.C. 1151) and this Court have reasonably sought to avoid.

**4. The Use of the Word "Cede" and the Payment Arrangement of the Act Did Not Change the Reservation Boundaries**

*a.* The State argues that the provisions "ceding" the unallotted portion of the Reservation to the United States tacitly removes that land from the Reservation.

There are several reasons why this is not so. First the "cession" is not an outright return of the land to the public domain but a transfer expressly for the limited purpose of opening the land for homesteading in accordance with the General Allotment Act. Thus, though the Indians in the "cession" expressed their willingness that the government dispose of unallotted land, the government remained under a trust responsibility to dispose of it in a certain way, assumed to be in the Indians' interest as well as that of the government.

That a "cession" of unallotted land within a reservation does not of itself disestablish the reservation is supported by this Court's decision in *Ash Sheep Co.* v. *United States,* 252 U.S. 159. The question was whether the defendant had grazed its sheep on public land, which was entirely legal, or on "land belonging to any Indian or Indian tribe" in violation of R.S. 2117. The lands involved were (252 U.S. at 164):

> within the part of the Reservation as to which the Indians, in terms "ceded, granted, and relinquished" to the United States all of their "right, title and interest."



Nevertheless, the Court held that the lands remained in Indian ownership until actually sold to homesteaders because the lands were ceded to the United States only for subsequent sale (except for the 16th and 36th sections) and on conditions set forth in the Act. While, in our case, jurisdiction rather than ownership is at issue, *Ash Sheep Co.* at least indicates that the use of the word "cede" does not always imply a termination of the Indian-federal relationship as to the land "ceded".

*b.* The State, however, argues (see DeCoteau, Resp. Br. 59-65) that because the Tribe was paid a "sum-certain" for the unallotted land, with the government recouping its money as the lands were sold, rather than being paid as the lands were sold to homesteaders, the conveyance to the government should be held to have removed the lands from the Reservation. We see no reason so to conclude.

The payment, realistically, was no more immediately available to the Tribe than if it had been paid only as each tract was sold. The monies stipulated as payment for the lands ceded were to be deposited in the United States Treasury, and the expectation was that only the interest on this trust fund would be expended, and then only as found necessary for the benefit of the Tribe by the President or Congress. As Congressman Call explained:

> * * * The amount is reimbursed, so that it is but a nominal appropriation. The entire amount come back into the Treasury. It is nothing but a loan of the public credit of the United States to the accomplishment of these purposes [of the General Allotment Act] and in no respect touches the taxation upon the people of this country.
>
> Mr. President, there has been a great deal of objection found to this bill which has no just foundation. All the legislation to the bill is but the applica-

tion of the existing law on the subject. [22 Cong. Rec. 3881, reprinted in DeCoteau, Resp. Br. 65].

Consequently, payment in this manner is not a reliable indication of an intent by Congress to change the boundaries of a reservation. Where the references to allotment and opening under the General Allotment Act are as specific as they are here and where, as here, there is no language even arguably disestablishing a discrete part of the Reservation, the payment scheme does not indicate disestablishment any more than would a scheme of payment as individual lots are sold to homesteaders. In either situation, the conveyance of the unallotted lands is handled by the government for the benefit of the Tribe in accordance with the General Allotment Act without thereby terminating the Reservation. Compare *Seymour* v. *Superintendent, supra,* 368 U.S. at 354-359.

**5. The Provision of the 1891 Act Referring to the "Laws of the State Wherein Located" Did Not Disestablish All or Part of the Reservation**

The Act of 1891 provides that the land ceded shall "be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *" (Decoteau, Pet. Br. App. 15). The Supreme Court of South Dakota, in *DeCoteau,* interpreted the final phase of this passage as expressly subjecting activities on all lands sold to state civil and criminal jurisdiction (DeCoteau, Pet. App. A, 5a-7a). The Eighth Circuit in *Erickson* found the language ambiguous—both as to its general meaning and as to whether it applied only to the school sections (which the court considered more plausible) or to all land sold. It concluded that "[W]e do not read this clause as a clear indication of congressional intention to terminate the Lake Traverse Reservation" (Erickson, Pet. App. A, 6a-7a). In our view, the "laws



of the state" language is simply not addressed to the question of whose law shall govern acts committed on the land in question; the purpose is, rather, to make clear that, while the unallotted land shall be open only to settlement under the federal homestead and townsite laws, an exception is made for the 16th and 36th sections which are to be used only for common school purposes and may be used or sold as permitted by state law for that purpose.

The language was necessary because the South Dakota Enabling Act did not reserve the 16th and 36th sections in Indian reservations for school purposes, and special language was needed to accomplish that purpose. See the Statement of Senator Gamble at 35 Cong. Rec. 3187 and the Statement of Congressman Burke at 38 Cong. Rec. 1423, both reproduced at DeCoteau, Resp. Br. 136-138. Indeed, if the "ceded" land had been regarded by Congress as no longer forming part of the Reservation, no such special language would have been needed to establish the 16th and 36th sections as school land.[7]

In sum, while the Act of March 3, 1891 paved the way for homesteading by non-Indians within the Lake Traverse Reservation, it did not change the boundaries of the Reservation or abolish it. Thus questions of criminal and civil jurisdiction within this Reservation are determined as within any other Reservation.

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[7] See Section 1 of the Act of March 2, 1895, 28 Stat. 899-900, 43 U.S.C. 856, which, 4 years later, provided general authorization for state selection of school lands "within the boundaries of any Indian reservation in such state" from "surplus lands * * * purchased by the United States."

## II

### SUBSEQUENT ADMINISTRATIVE AND LEGISLATIVE ACTIONS CONFIRM THAT THE 1891 ACT DID NOT DISESTABLISH THE 1867 TREATY BOUNDARIES

*a.* The most important administrative interpretation of the 1891 Act is a contemporaneous proclamation of President Harrison opening the Reservation for settlement (Procl. of April 11, 1892, 27 Stat. 1017, DeCoteau, Pet. Br. App. 16-20). In that Proclamation, made after enactment of the 1891 Act and after payment to the Tribes for the land "ceded," the President consistently referred to the Reservation in the present tense and the lands opened for settlement as "lands embraced in said reservation" (DeCoteau, Pet. Br. App. 18). The Proclamation further referred the reader to "the accompanying schedule, entitled 'Schedule of lands *within the Lake Traverse Reservation opened to settlement* by proclamation of the President * * * " (*id.* at 19; emphasis added). This proclamation is important not only because it is a contemporaneous construction of the effect of the 1891 Act, but also because it was the basis on which non-Indian settlers purchased land, giving them fair warning that they were purchasing land within an Indian reservation.

Subsequent executive orders extending the trust period on allotments on April 16, 1914, and April 19, 1924, (Nos. 1916 and 3994, respectively) each refer to the "Sisseton and Wahpeton Bands of Sioux Indians of the Lake Traverse Reservation, North and South Dakota." And in decisions and literature of the Department of the Interior after 1891 there are numerous references to land "in" or "within" the Lake Traverse Reservation. *Circular, Sisseton and Wahpeton Lands,* 14 L.D. 302; *Madella O. Wilson,* 17 L.D. 153; *Edward Parant,* 20 L.D. 53. Nothing could be clearer than the report of the Sisseton-



Wahpeton Indian Agent in 1900 describing the Reservation:

> The reservation is in the northeastern part of South Dakota, occupying parts of Roberts, Day, Grant, Marshall and Codington counties and extending into Richland and Sargent counties of North Dakota. It is about 120 miles long and at the State line 42 miles wide, coming to a point near Watertown, S. Dak. * * *
>
> There are 1,970 [allotted] pieces of land situated from one end of the reservation to the other * * *.
>
> [Annual Report, Commissioner of Indian Affairs, United States Indian Affairs Office, 385 (1900)].

See also the reference to the Annual Reports of the Commissioner of Indian Affairs in DeCoteau, Pet. Br. 42, n. 30.

Of equal importance, the exercise of trust responsibility by the United States for this Tribe, and the Tribal relationship of its members, remained intact. A decision of the Eighth Circuit in 1901, ten years after allotment and disposal of surplus land, makes this continuing relationship clear. *Farrell* v. *United States*, 110 Fed. 942. The case concerned the application of the laws against sale of liquor to Indians to a sale to one La Framboise, a person of mixed Sioux and Caucasian ancestry. While the boundaries of the Reservation were not at issue, La Framboise's membership in the Sisseton-Wahpeton Tribe was. The court noted that:

> La Framboise had received his allotment and patent, and the lands within the reservation of the Sisseton and Wahpeton bands of Sioux Indians, to which he belonged, that had not been allotted, had been opened to settlement * * *. [*Id.* at 947.]

Nevertheless, it was found that there was continuing regulation by the Tribe of its membership and family

relations and constant supervision over the Tribe by the resident federal agent:

> [The issuing of allotments] did not radically change the title to the lands reserved for [these Indians], or their need of care and education. The government held the title to their reservation in trust for them collectively before, it held the title to their allotments in trust for them individually after, the issue of the patents. There was every reason why congress should retain and exercise its power to superintend the trade with them, and none to induce it to renounce it. By the treaty of 1867 the United States agreed to appoint and maintain an agent for these Indians at Lake Traverse, and by its legislation and the rules of the interior department it made it the duty of this agent to use every endeavor to suppress the traffic in intoxicating liquors with them, to educate them, and to induce them to cultivate the soil. There has been no express abrogation of this agreement in any subsequent treaty or act of congress, and the government has continued to comply with it since the allotments as it did before. Agreements are not released or abrogated and statutes are not repealed by implication unless the subsequent agreements or laws are necessarily repugnant to those which preceded them. [*Id.* at 951.]

This evidence of the continued exercise of federal trust responsibility after the opening of the Reservation supports our conclusion that the Reservation was opened, but not dissolved. See also *United States* v. *Rickert*, 188 U.S. 432.

We have been unable to discover contemporaneous opinions of the Department of the Interior directed precisely to the jurisdictional effect of the 1891 Act. There are, however, two recent decisions, predating either of the appellate decisions under review, and rendered at a time when *DeMarrias* v. *State*, 319 F. 2d 845 (C.A. 8),



overruled by the *Erickson* decision, was still intact. Both decisions, made by the Field Solicitor of the Department of the Interior in Aberdeen, South Dakota (the office which deals with this Tribe on a regular basis), sustained the continued federal and tribal authority and the commenusurate lack of state jurisdiction over Indians within the Treaty boundaries of the Lake Traverse Reservation (Opinions of June 9, 1972 and August 16, 1972, DeCoteau, Pet. Br. App. 21-33). Interpretation of a law by the government agency responsible to administer it is, of course, entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16. This is particularly true when the statute may affect the status of an Indian reservation and the trust responsibilities of the United States. *Seymour* v. *Superintendent, supra*, 368 U.S. at 357; *Mattz* v. *Arnett, supra*, 412 U.S. at 505.[8]

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[8] South Dakota points out (DeCoteau, Rep. Br. 113-116) that the depiction of the Reservation on government maps varied considerably over the years since 1891. From 1892 to 1908 the Reservation was not shown on the maps. From 1909 to 1917 the Reservation was shown as an "open" reservation, but the 1918 map shows it was a "former" reservation. Modern maps show the Reservation simply as a "reservation." We think these differences are unimportant. The early map-makers wanted to show that the lands were no longer reserved for exclusive Indian occupancy, but were open for settlement. As this Court and Congress began to refine the jurisdictional meaning of such openings the map makers followed suit. Indeed the meaning of the word "reservation" itself has changed over the years. In early years it seemed to have been used to mean literally land reserved for exclusive Indian use. Later, as a result of the various "opening" Acts, it came to have the broader jurisdictional meaning that it has today. The first decision of this Court to clarify the meanings of "reservation" and "Indian country" after the General Allotment Act was *United States* v. *Celestine*, 215 U.S. 278, 285-286. This process of clarification continued with enactment of 18 U.S.C. 1151 and this Court's subsequent decision in *Seymour* v. *Superintendent, supra*. Thus, as with early maps, early casual references to the Reservation as the "former reservation" (see DeCoteau, Br. 9) are of little significance; they indicate only that the Reservation had been opened for non-Indian settlement, which is not disputed. South Dakota also points out a

b. Congress, since the opening of the Reservation, has continued to appropriate funds for the Sisseton-Wahpeton Reservation or Agency[9] and has never referred to the Reservation as a "former reservation," as it did with the reservations recognized by this Court as continuing to exist in *Seymour* v. *Superintendent, supra,* 368 U.S. at 356, n. 12, and *Mattz* v. *Arnett, supra,* 412 U.S. at 496, n. 17. This consistent appropriation process is a significant exercise of trust responsibility. Recently, moreover, Congress has unmistakenly reaffirmed its view that the opening of the surplus lands to non-Indian settlement did not terminate or diminish the Reservation (Public Law 93-489 and Public Law 93-491, signed by the President October 26, 1974). Indeed, in Public Law 93-489 Congress restored to "the United States in trust for the Sisseton-Wahpeton Sioux Tribe" certain federally owned land "of the Lake Traverse Indian Reservation in North and South Dakota." Since the land had not been trust land, this is a clear indication of the congressional understanding that the Reservation was never abolished and always included non-trust land. Similarly, Public Law 93-491 authorizes the Secretary of the Interior to acquire lands:

> *within the boundaries of the Lake Traverse Reservation* * * * for the purpose of consolidating land-

reference to the "former Sisseton Indian Reservation" in *United States* v. *Rickert, supra,* 188 U.S. at 432 (see DeCoteau, Resp. Br. 173). That phrase, however, is not the Court's but part of a question from the pleadings below as recited in the question certified to the Court. Reservation bundaries were not at issue and the use of the phrase must be considered in light of its limited meaning at the time.

[9] See, for typical early appropriation language, 39 Stat. 988 and 42 Stat. 576. In recent years general appropriations have not been by particular reservation or agency. An extensive accounting of trust funds of the Tribe expended by the United States is available in General Services Administration Report, *The Lower Sioux Indian Community in Minnesota, et al.,* Docket No. 363 (June 1967) before the Indian claims Commission.



> holdings, eliminating fractional heirship interests in Indian trust lands, providing land for any tribal program for the improvement of the economy of the tribe and its members through the development of industry, recreational facilities, housing projects, and the general rehabiiltation and enhancement of the total resource potential *of the reservation.* [Emphasis added.]

It further authorizes the Tribe to sell tribal property and, from the proceeds, purchase *"other land on the reservation."* Again, we have a recognition of the Reservation's existence beyond trust lands and its continued service as the home and political jurisdiction of the Sisseton-Wahpeton Tribe. While these recent Acts are not determinative of an earlier congressional intent, they are consistent only with the continuity of the Reservation's original boundaries and should be given weight. See *Seymour* v. *Superintendent, supra,* 368 U.S. at 356.

## III

### THE TRIBE'S INHERENT RIGHT OF SELF-GOVERNMENT, CONFIRMED IN THE TREATY OF FEBRUARY 19, 1867, AND THE PRACTICALITIES OF PERFORMING THE CONTINUING TRUST RESPONSIBILITY OF THE UNITED STATES TOWARD THE TRIBE SUPPORT THE INTERPRETATION OF THE ACT OF 1891 AS NOT DIMINISHING THE RESERVATION

We have discussed the jurisdiction of the State within the borders of the Lake Traverse Reservation primarily in terms of the precise wording of the statute opening the Reservation for non-Indian settlement. But the alleged ambiguity of the Act of 1891 and of similar Acts opening reservations also calls for a broader approach.

We note, first, that the Sisseton-Wahpeton Tribe remains an important and populous Indian tribe exercising

its federally guaranteed powers of self-government under federal guardianship. A large amount of land, scattered about within the boundaries of the Reservation, remains trust land. The State of South Dakota did not choose to assume responsibility for civil and criminal law and law enforcement within Indian country in the state when it could have done so under Public Law 280, *supra*. Compare *Williams* v. *Lee*, 358 U.S. 217, 222-223; *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 177-178. Nor is the decision that the State asks of this Court one that could give the State jurisdiction over acts occurring on trust land. Instead, the result sought by the state would greatly increase the difficulty of achieving adequate law and order on the reservation by requiring patchbook jurisdiction—state jurisdiction over Indians on this lot, federal or tribal jurisdiction on the next. Obviously, such an absurd result, in a reservation such as this, where a large Indian population lives, ought to be avoided, if possible.

Also, and equally important, it is, and has been, the policy of the United States that, unless specifically terminated by Congress, Indian tribes are self-governing political communities. In *McClanahan* v. *Arizona State Tax Commission, supra*, 411 U.S. at 168, this Court stated:

> * * * "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive * * *."

See also *Williams* v. *Lee, supra*, 358 U.S. at 220:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.



This right to self-government was explicitly guaranteed the Sisseton-Wahpeton Tribe in its 1867 Treaty with the United States and has never been taken away by Congress. Article 10 of that Treaty states (DeCoteau, Pet. Br. App. 6):

> The chiefs and head-men located upon either of the reservations set apart for said brands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians * * * .

Tribal control over domestic relations, at issue in *DeCoteau*, is at the heart of this right of Tribal self-government. See, *e.g.*, *United States* v. *Quiver*, 241 U.S. 602, 603-604. The question of a child's welfare cannot be decided without reference to his family structure. This involves both a sympathetic knowledge of the individuals involved, and a knowledge of the background culture. No matter how well-intentioned, state authorities are not likely to have insight into these important areas. Moreover, if such authorities are to have jurisdiction over tribal children in dependency and neglect cases, there is a substantial chance that such children may be placed in non-Indian homes outside the Reservation and be deprived of their cultural identity.[10] The Sisseton-Wahpeton Tribe

[10] This concern, in the light of present experience, was strongly expressed by the North American Indian Women's Association in a recent report. North American Indian Women's Association, Inc., *Project Report for Development of a Prototype Program for In-*

opposed such practices in a tribal resolution on July 6, 1972, which states:

SISSETON-WAHPETON SIOUX

WHEREAS, The Sisseton-Wahpeton Sioux Tribe is interested in the well-being of all the enrolled members of the tribe and

WHEREAS, Minor children of Sisseton-Wahpeton descent have been placed in non-Indian foster and adoptive homes all over the United States,

WHEREAS, The Tribal council is in the process of researching the sovereign status of the tribal entity in respect to its jurisdiction as stated in the constitution of the Sisseton-Wahpeton Sioux Tribe, and,

WHEREAS, It is the intent of the Sisseton-Wahpeton Sioux Tribe to establish its own method of social and economic development and well-being of the enrolled members, and,

WHEREAS, It is the strong feeling of the tribal council "to make every stand possible to keep these children on the reservation" (minutes of June 6th council meeting) and "the tribal council would like these children to be placed in an Indian licensed home until an Indian home can be found for them to be adopted."

THEREFORE, BE IT RESOLVED, that Mr. Bert Hirsch, legal counsel from the Association of American Indian Affairs, will stand on these grounds in his argument in Roberts County Court on July 7, 1972 and future cases of this nature.

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*dian Children with Special Needs*, BIA Contract No. K51C14200761, December 15, 1973. The first recommendation made by the study was that "[W]hen at all possible, Indian Children should be placed with Indian foster parents." *Id.* at 62.



The Sisseton-Wahpeton Tribe is a responsible body, concerned about its young people. It should have authority over dependency and neglect and similar proceedings concerning its own people anywhere within the Reservation.[11] If this authority were fragmented so as to apply only to acts committed on trust land within the Reservation, it would be practically meaningless as an exercise of effective self-government. And neither the Tribe, in domestic relations matters and with respect to the criminal offenses left to its control, nor the United States, in its control over major crime, should have to search the tract books in order to determine whether it or the State has jurisdiction. *Seymour* v. *Superintendent, supra,* 368 U.S. at 358.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of South Dakota should be reversed and the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

WALLACE H. JOHNSON,
*Assistant Attorney General.*

LOUIS F. CLAIBORNE,
HARRY R. SACHSE,
*Assistants to the Solicitor General.*

EDMUND B. CLARK,
EDWARD J. SHAWAKER,
*Attorneys.*

NOVEMBER 1974.

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[11] The Tribe has assumed such authority under its tribal code.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

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No. 75-562

ROSEBUD SIOUX TRIBE, PETITIONER

*v.*

HONORABLE RICHARD KNEIP, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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**BRIEF OF THE UNITED STATES AS AMICUS CURIAE**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-61) is reported at 521 F.2d 87. The opinion of the district court (Pet. App. 63-113) is reported at 375 F.Supp. 1065.

## JURISDICTION

The judgment of the court of appeals was entered on July 16, 1975 (Pet. App. 61). A petition for a writ of certiorari was filed on October 11, 1975, and was granted on May 24, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether three Acts of Congress, which authorized the sale of land within portions of the Rosebud Indian Reservation to non-Indians and directed that the proceeds of



each sale as received should be deposited in trust for the benefit of the Tribe, diminished the exterior boundaries of the Reservation as they existed in 1889.

## STATUTES INVOLVED

The Acts of April 23, 1904, 33 Stat. 254; March 2, 1907, 34 Stat. 1230; and May 30, 1910, 36 Stat. 448, are set forth in Appendix C to the petition.

## STATEMENT

In June 1972, the Rosebud Sioux Tribe of Indians filed suit in the United States District Court for the District of South Dakota, seeking a declaratory judgment that the exterior boundaries of the Rosebud Reservation, as defined in the Act of March 2, 1889, 25 Stat. 888, had not been altered by three Acts of Congress (Act of April 23, 1904, 33 Stat. 254; Act of March 8, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448) opening certain unallotted surplus land to non-Indian settlement.

In the Act of March 2, 1889, Congress "restored to the public domain" (25 Stat. 896) one-half of the Great Sioux Reservation established in 1868, but preserved for the Sioux Tribes six Reservations in present-day North and South Dakota (*id.* at 888-890). Among these was the Rosebud Reservation, located in the south central portion of South Dakota, and composed of the Counties of Todd, Tripp and Mellette, and parts of Gregory and Lyman counties.[1]

In 1901, the Rosebud Tribe agreed (Pet. App. 15, n. 21) to "cede * * * and convey to the United States" for a specified sum of $1,040,000 the unallotted land within the Gregory County portion of its Reservation for non-Indian settlement Congress rejected this agreement

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[1] A map of the Reservation, showing the 1889 boundaries and the boundaries as found by the court of appeals, is reproduced at Pet. App. 113.

in 1902 and 1903. The problem "was, simply put, money" (Pet. App. 16). Congress then "amended and modified" the agreement (Pet. App. 117) and enacted it as the Act of April 23, 1904 (Pet. App. 117-120). The primary amendments were that (1) the Indians were not guaranteed any consideration for the land except with respect to the 16th and 36th sections (school sections), but were to be paid only as the lands were actually sold to settlers;[2] (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. 118, with Art. III, Pet. App. 115-116).

The Rosebud Reservation was further opened by the 1907 Act, which, as passed, provided (Pet. App. 121) "that the Secretary of the Interior * * * is hereby, authorized and directed, * * * to sell or dispose of all that portion of the Rosebud Indian Reservation * * * [within Tripp County] except such portions thereof as have been, or may hereafter be, allotted to Indians" (and except school sections that were to be paid for by the United States, and granted to the State).[3] The 1907 Act further provided (Section 5, Pet. App. 122-123) that the funds received should be deposited in an interest-bearing account in the Treasury of the United States "to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation," that the interest shall be paid annually to the Indians, that all funds up to one million

[2] Section 2 of the Act (Pet. App. 119) set forth a schedule of the prices per acre for the land, which varied according to the time at which the land was sold.

[3] Each Act contains substantially identical school land provisions to the effect that Sections 16 and 36 of the lands in each township are not to be disposed of, but are reserved for donation to the State for use as common schools. These lands were to be paid for by the federal government. See Pet. App. 120, 121, 123, 127.



dollars should be distributed after ten years on a per capita basis to the Indians, and that the balance should be expended or distributed for the Indians' benefit at the discretion of the Secretary of the Interior. The 1907 Act concluded, as did the 1904 Act (Section 6, Pet. App. 120), with a section declaring (Section 8, Pet. App. 123):

> * * * nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the *United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided* * * *. [Emphasis added.]

The 1910 Act (Pet. App. 124-127), like the 1907 Act (Pet. App. 121), began with an authorization to the Secretary to "sell and dispose" of surplus lands within a described portion (Mellette County) of the Reservation App. 124).[4] The Act further provided (*ibid.*)

> [t]hat any Indians to whom allotments have been made on the tract to be *ceded* may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation * * *. [Emphasis added.]

The 1910 Act further required (Section 4, Pet. App. 125) that a commission be established, composed of "[o]ne resident citizen of the State of South Dakota, one representative of the Interior Department, and one per-

[4] The 1907 Act uses the phrases "sell *or* dispose" (emphasis added).

son holding tribal relations with said tribe of Indians," to determine the price setters would be charged for the land. The proceeds of any eventual sales were to be deposited in the Treasury to the credit of the "Indians belonging and having tribal rights on the said reservation," which "shall be at all times subject to appropriation by Congress for their education, support, and civilization" (Section 7, Pet. App. 126). The 1910 Act (Section 11, Pet. App. 127), like the earlier Acts (Section 6, Pet. App. 120; Section 8, *id.* at 123), explicitly stated that the United States was not obligated to purchase the surplus land, except Sections 16 and 36 for school purposes, and would act only as trustee for the Indians in disposing of the surplus land.

In a lengthy opinion the district court held that each of the 1904, 1907 and 1910 Acts extinguished the portion of the Reservation to which it applied (Pet. App. 63-113; see *id.* at 113). The court found no language in the Acts expressly terminating the Reservation in the counties involved and no "express discussion of state versus federal jurisdiction over the lands in question" (*id.* at 85); however, the court held that, in light of the "surrounding legislative history and the circumstances" (*id.* at 109) from 1901 to 1910, Congress intended to extinguish the portions of the Reservation at issue.

The United States Court of Appeals for the Eighth Circuit affirmed (Pet. App. 1-61), after this Court had decided *DeCoteau* v. *District County Court*, 420 U.S. 425. The court rejected arguments of the Tribe, and the United States as *amicus curiae*, that the language of the Acts interpreted in light of prior decisions of this Court did not abolish the disputed portions of the Reservation, and that neither the legislative nor the administrative history established that the State had undisputed jurisdiction to the exclusion of the Tribe and the United States. The court thought that prior decisions, including this Court's decisions in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnett*, 412 U.S. 481, and its own decisions



in *City of New Town, North Dakota* v. *United States*, 454 F. 2d 121, and *United States ex rel. Condon* v. *Erickson*, 478 F. 2d 684, were "of limited utility" in deciding this case (Pet. App. 5) and concluded that "the overriding judicial inquiry remains unchanged, namely, the congressional intent" (*ibid.*). Stating that this Court's decision in *DeCoteau, supra*, permitted it to utilize "all materials reasonably pertinent to the legislation * * * as well as those bearing upon the historical context of its passage, such as the social forces then at work in the area * * *" (Pet. App. 8), the court found a "continuity" of circumstances from 1901 to 1910 that demonstrated Congress' intention to extinguish Indian jurisdiction over the areas in question (*id.* at 26-28, 34, 38, 39-40, 44, 46, 48).

## SUMMARY OF ARGUMENT

It is the position of the United States that the Acts of 1904, 1907, and 1910, while opening portions of the Rosebud Reservation to non-Indian settlers, did not contract the exterior boundaries of the Reservation. This position is based upon our assessment of the Acts themselves, the contemporary social and legislative history, subsequent treatment of the lands by the Department of the Interior, and doctrines developed by this Court in similar cases. While the courts below gave some attention to each of these factors, we believe that the courts overemphasized inconclusive legislative history. A more balanced analysis, we submit, requires a finding that Congress did not intend by these Acts to terminate most of the Reservation but expected that termination would occur, if at all, when the trust period on allotments expired.

This Court's decisions require compelling evidence to prove that reservation boundaries have been cut back without the consent of the affected Indian tribe and without guaranteed payment for the opened lands. Any different construction would place Indians in the position of surrendering jurisdiction over substantial portions of

their reservation before any benefits had been assured or received. Thus, the Court found in *Seymour* v. *Superintendent,* 368 U.S. 351, and *Mattz* v. *Arnett,* 412 U.S. 481, that unilateral Acts of Congress, providing that the United States would not purchase Indian lands but would merely act as trustee for their sale, did not commit the opened lands to state jurisdiction. The Acts opening the Rosebud Reservation were drafted in similar fashion and are to the same effect.

The Acts of 1904, 1907, and 1910, do not demonstrate an intention to return lands to the public domain, and the clear language of other Acts expressly restoring lands to the public domain is notably absent. In contrast to public lands, which are subject to disposition under general laws, the lands of the Rosebud Reservation were to be sold only in accordance with the terms of the trust established by Congress; all proceeds were explicitly dedicated to the benefit of the Tribe. In fact, Congress included a provision granting school lands to the State in each Act, despite this Court's holding in 1902 that such provisions were unnecessary when lands were restored to the public domain. *Minnesota* v. *Hitchcock,* 185 U.S. 373.

Subsequent administrative actions confirm that the Acts did not disestablish the 1889 boundaries of the Reservation. Under the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U.S.C. 461, *et seq.,* the Department of the Interior restored to Indian ownership lands in the opened portion of the Reservation, an action that could not have included lands "upon the public domain outside the geographic boundaries of any Indian reservation * * *" (48 Stat. 986). Moreover, numerous communications and reports show that the Department, before and after the Indian Reorganization Act, recognized territory in the opened counties as within the Rosebud Reservation. Recent appropriations are consistent with that viewpoint.



The uncertain legislative history does not demonstrate a contrary intention. Despite the emphasis placed on the legislative history by the court of appeals, the reports and debates show that Congress at no time concerned itself with the question of jurisdiction over the opened lands. While the court of appeals stressed references made in unrelated contexts, we submit that the inferences to be drawn from such references are at best ambiguous. They do not merit the weight that they received in the court of appeals.

The Acts of 1904, 1907, and 1910, therefore, do not demonstrate congressional intent to impede the Tribe's right to govern its own people.

## ARGUMENT

### I. THE DECISIONS OF THIS COURT HOLD THAT ACTS OF CONGRESS ESTABLISHING TRUSTS FOR THE SALE OF INDIAN LANDS DO NOT REDUCE RESERVATION BOUNDARIES

This Court, in deciding Indian cases, does not write upon a fresh slate. The Court has long recognized that "[t]he relation of the Indian tribes living within the borders of the United States * * * [is] an anomalous one and of a complex character." *United States* v. *Kagama,* 118 U.S. 375, 381. "Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States." *Id.* at 383-384 (emphasis in original). With respect to legislation, therefore, "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw,* 280 U.S. 363, 367.

During the past fifteen years this Court has been asked three times to decide whether Congress intended to cut back reservation boundaries or to open up reservation lands for settlement with the existing boundaries unchanged. *Seymour* v. *Superintendent,* 368 U.S. 351;

*Mattz* v. *Arnett,* 412 U.S. 481; *DeCoteau* v. *District County Court,* 420 U.S. 425. The principles developed by those decisions are directly applicable to the questions raised in this case.

In *Seymour,* this Court considered the effect of the Act of March 22, 1906, 34 Stat. 80, on the Colville Indian Reservation in the State of Washington. In 1892, the United States expressly vacated and restored a portion of the Reservation "to the public domain," 27 Stat. 62, 63. In the 1906, Act, however, no such language was included; the Secretary was merely directed "to sell or dispose" of unallotted lands within the Reservation (34 Stat. 80) and to place the proceeds as received from settlers into the Treasury for the benefit of the Indians (34 Stat. 81). The Act further provided that the United States would act as a trustee in disposing of these lands for the Indians' benefit and not as a purchaser (34 Stat. 82). Because *Seymour* involved a criminal matter, this Court assessed the meaning of the 1906 Act against the backdrop of the definition of "Indian Country" found in 18 U.S.C. 1151.[5]

This Court concluded that "the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on that reservation." 368 U.S. at 356. The Colville Act "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards" (*ibid.*). The Court noted that any other conclusion would result in checkerboard jurisdiction over

[5] Indian country is defined, in part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation * * *."



Indians, a consequence that Congress sought to avoid by enacting 18 U.S.C. 1151 (*id.* at 358).[6]

In *Mattz* this Court was required to decide whether the Klamath River Indian Reservation in California was terminated by an 1892 Act of Congress or remained Indian country as defined in 18 U.S.C. 1151 (412 U.S. at 483). After assessing legislative history and subsequent administration of the land by the Interior Department, the Court concluded, as it had in *Seymour,* that the mere opening of the Reservation to settlers did not mean that the Reservation was discontinued. Recognizing that "the House was generally hostile to continued reservation status of the land," the Court nonetheless found that Congress never terminated it (*id.* at 499)[7] but merely provided for sale of the surplus lands with the "proceeds of sales to be held in trust for the 'maintenance and education' * * * of the Indians" (*id.* at 504). Because a decision to terminate a reservation "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history" (*id.* at 505), this arrangement did not deprive the Indians of their important reservation rights.[8]

[6] This Court took particular note of the subsequent treatment of this area by Congress and by the Interior Department, and gave particular attention to the Department's decision, 54 I.D. 559, that land within the Colville Reservation previously opened to settlement could be restored to Reservation status under the Indian Reorganization Act of 1934 (368 U.S. at 357, n. 14). This Court recognized a period of "congressional confusion" when the area was referred to as the "former Colville Reservation" (*id.* at 356, n. 12), but did not find such references indicative of a Congressional intent to terminate jurisdiction over the Reservation.

[7] The State urged that a reference in the 1892 Act to "what was [the] Klamath River Reservation," indicated a Congressional intention to terminate. This Court found the reference to the Reservation "in the past tense * * * merely * * * a natural, convenient and shorthand way of identifying the land subject to allotment * * *" (*id.* at 498). Cf. *Seymour, supra,* 368 U.S. at 356, n. 12.

[8] After this Court's decision in *Seymour,* the Eighth Circuit considered whether the Act of May 29, 1908, 35 Stat. 460, opening

Placing the 1892 Act into the historic context of the General Allotment Act of 1887, 24 Stat. 388, the Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system* and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. *When all the lands had been allotted and the trust expired, the reservation could be abolished*" (412 U.S. at 496; emphasis added). See also *United States* v. *Nice*, 241 U.S. 591, 599. However, enactment of the Indian Reorganization Act in 1934, 48 Stat. 984, as amended, 25 U.S.C. 461 *et seq.*, ended the policy of allotment, and all trust periods were indefinitely extended (412 U.S. at 496, n. 18). Later, as the Court noted, portions of the land in the Klamath Reservation previously opened to settlement were withdrawn and restored to tribal ownership (*id.* at 496, n. 17 and 505).[9]

In *DeCoteau*, the Court determined the effect of the Act of March 3, 1891, 26 Stat. 989, 1035, on the Lake Traverse Reservation. The 1891 Act had ratified an agreement in which the Tribe expressly ceded to the United States all its "right, title and interest" in the land for a lump sum. The Court contrasted this transaction with the Acts involved in *Seymour* and *Mattz*

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the Cheyenne River Reservation in South Dakota, diminished its boundaries. Relying on *Seymour*, it held it did not, United *States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8), and this Court in *Mattz* twice noted that decision with approval, remarking that it presented "issues not unlike those before us" (412 U.S. at 497, n. 19 and 505, n. 23). The Eighth Circuit had reached a similar conclusion in *City of New Town, North Dakota* v. *United States*, 454 F.2d 121, involving the effect of the Act of June 1, 1910, 36 Stat. 455, opening the Fort Berthold Reservation.

[9] The Klamath River Reservation was also identified by the Interior Department (54 I.D. 559), as containing land, opened by the 1892 Act, which could be restored to reservation status.



(420 U.S. at 447-449), stating that it "adhere[d] without qualification to both the holdings and the reasoning of those decisions"; the Court, however, found that "gross differences between the facts * * *" (*id.* at 447) justified a finding that the Reservation had been terminated.

The differences identified by the Court are important to the present case. The 1891 Act was a negotiated agreement with the Tribe, whereas the Acts involved in *Seymour* and *Mattz* were "unilateral" Acts of Congress not agreed to by the Tribes (*id.* at 448). The 1891 Act was a straightforward cession for a sum certain in amount, and not the arrangement found in *Mattz* and *Seymour* where proceeds from uncertain future sales were placed in trust for the benefit of the Tribe (*id.* at 448-449). The Department of the Interior did not, as it had in *Mattz* and *Seymour*, consistently regard the Reservation as continuing (*id.* at 448). These distinctions led to the conclusion that the Lake Traverse Reservation was extinguished and the land restored to the public domain.

The fact that the Indians' land holdings would be diminished as the land was sold, therefore, does not mean that the Rosebud Reservation itself was abolished in the areas where the land subject to sale was located. In *DeCoteau* (but not in *Seymour* or *Mattz*) the United States itself purchased the land in the Reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the Reservation. 420 U.S. at 446-447. But under the Rosebud Acts, the federal government did not buy the Indians' land. The government acted merely as a trustee for the Tribe in selling its land to non-Indians; the land passed from the Indians to private individuals. It was not first made part of the public domain, and Congress appropriated no funds to pay for these lands, except for school sections. Rather, any funds distributed to or deposited on behalf of the Indians were to be derived from amounts

paid by the non-Indian purchasers. If there were no buyers interested in the land the government was to sell for the Indians, the Indians would have received no money; yet according to the reasoning of the court below, the Tribe nevertheless would have been deprived of three-fourths of its Reservation. Such an intention should not be attributed to Congress without the clearest kind of evidence.

Every court faced with similar questions, except the courts below, has found that such Acts of Congress did not extinguish portions of the Reservations but instead opened the Reservations to allow integration of Indians and settlers and to provide needed lands for the western migration.[10] This construction is consistent not only with proper concern for Indian sovereignty but also with the long-standing reluctance to place Indian wards within the reach of state jurisdiction. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789.

Although the court of appeals found these principles "of limited utility" (Pet. App. 5), we believe they may not be so lightly dismissed.[11] While we do not read the

[10] *Russ* v. *Wilkens*, 410 F. Supp. 579 (N.D. Cal.); *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F. Supp. 1001 (D. Minn.); *City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (C.A. 8); *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8); *Putnam* v. *United States*, 248 F.2d 292 (C.A. 8); *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452 (D. Mont.), affirmed, 534 F.2d 1376 (C.A. 9), pending on petition for certiorari, No. 76-185.

[11] The court of appeals apparently misunderstood (Pet. App. 24-25) the significance of the fact that Congress did not secure the approval of the Rosebud Indians as required by the Treaty of 1868 (15 Stat. 635, 639). While Congress had the power to dispose of lands without such consent, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, its decision to do so must be regarded as unilateral. In fact, the government's negotiator, Inspector James McGlaughlin, repeatedly stressed to the Indians that their lands could be sold



cases to say that Congress could never remove lands from a reservation by a unilateral decision to act as trustee for their sale, that construction should be greatly disfavored. This is particularly true when, as here, Congress demonstrated quite clearly that it did not intend to place the Indian lands within the public domain.

## II. THE ACTS OF 1904, 1907 AND 1910 DID NOT RESTORE INDIAN LANDS TO THE PUBLIC DOMAIN

The United States does not dispute that Congress during the early 1900's expected that Indian reservations at some point would be abolished. Congress was faced with pressures to open additional land located within existing Indian reservations and Congress itself desired that Indians gradually develop a less tribal way of life. The integration of Indians with white settlers was viewed as an important step in that development. The question in this case, therefore, is not whether Congress intended the Rosebud Reservation to continue unchanged indefinitely but whether termination was to occur immediately upon passage of the Acts or at some later time, when the trust period on allotted Indian lands had expired.

1. The language of the Acts themselves does not disclose an intent to return land to the public domain. The 1904 Act provides for the Indians to "cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted [within Gregory County]" (Pet. App. 115), but that terminology was simply carried over from the unratified agreement for sale at a sum certain. The 1904 Act nowhere provides that the Reservation was abolished or that the lands were to be restored to the public domain. The Acts of 1907 and 1910 provide that the Secretary

without their consent and that they should redirect their efforts to securing a reasonable price. *E.g.*, A. 476, 481, 490, 776, 803-804.

of the Interior shall "sell or dispose" (in the 1907 Act) or "sell and dispose" (in the 1910 Act) "of all that portion of the Rosebud Indian Reservation subsequently described (Pet. App. 121, 124). Again no mention is made that the Reservation is *pro tanto* terminated or that the lands were to become public lands. This reticence is in marked contrast to the express language used by Congress in other statutes. See 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) ("the same being a portion of the Colville Indian Reservation * * * be, and is hereby, vacated and restored to the public domain"); 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished"). See also *Mattz* v. *Arnett, supra,* 412 U.S. at 504, n. 22.[12]

The mere fact that the government had power to sell the Indians' lands does not mean that they are public lands. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall* v. *Sanger,* 92 U.S. 761, 763. The United States commonly owns public lands free of beneficial rights and may dispose of them for its own benefit. Its power over the Rosebud Reservation lands, however, was significantly different; under the Acts of 1904, 1907, and 1910, the United States could sell the lands only under specified conditions and was required to administer the proceeds for

[12] The language of the 1904 Act is similar to the statutory language discussed in *DeCoteau, supra,* and found sufficient to terminate the Reservation. But Congress had *ratified* a sale for a sum-certain in that case, and the words of cession in that context merely reflected the common understanding of the Indians and the government. The words in this case were originally part of a similar agreement, which Congress refused to ratify. Although Congress retained the form of the agreement in passing the 1904 Act, the language disappeared in the Acts of 1907 and 1910, both of which were passed without tribal consent.



the benefit of the Rosebud Indians. Unlike agreements providing for sale for a sum-certain, the three Acts in question specifically stated that the United States did not guarantee to buy, or even to find purchasers for, the affected lands. In fact, part of the lands was later released from the trust in accordance with the Indian Reorganization Act of 1934 (pp. 28-33, *infra;* App. A, *infra,* p. 1A).

The provision for school lands in each of the three Acts indicates that Congress was aware of the nature of this trust. In May 1902, this Court, in *Minnesota* v. *Hitchcock,* 185 U.S. 373, had considered the troublesome question whether a cession-in-trust to the government for resale gave Minnesota the right to Sections 16 and 36 of the ceded lands for school purposes.[13] (The Enabling Act admitting Minnesota to the Union, like the Enabling Act for South Dakota, provided that the State was entitled to Sections 16 and 36 from all "public lands" within the State for schools.) This Court concluded that, while Minnesota would be entitled to Sections 16 and 36 of public lands even though no express exception in the instrument of conveyance was made (185 U.S. at 392-393), the land in question had never been restored to the public domain because the cession was in trust and the proceeds from uncertain future sales were to be deposited in the Treasury for the Indians' benefit (185 U.S. at 395). Thus Congress, if it wanted the State to receive Sections 16 and 36 while they remained within

[13] Congress was well aware of the importance of *Minnesota* v. *Hitchcock.* After the Department of the Interior moved to dismiss the State's original action in this Court, on the ground that the Chippewa Indians were indispensable parties, Congress passed an Act expressly permitting the Interior Department to appear instead of the tribe in such cases. Act of March 2, 1901, 31 Stat. 950. The Committee Report on the bill (H.R. 14191) stated that "it is of the utmost consequence * * * that there be the most speedy determination of a vexed question that has dragged through forty years" (H.R. Rep. No. 2948, 56th Cong., 2d Sess. 1 (1901)).

the opened Indian reservation, had to include an express provision to that effect. Such provisions were contained in all three Rosebud Acts.[14]

The legislative history of these provisions, though sparse, is instructive. In 1902, bills were introduced to ratify the Agreement negotiated with the Tribe in the previous year. The bill reported to the Senate, in addition to supporting approval of the Agreement, proposed an additional provision not originally negotiated: the inclusion of a requirement reserving Sections 16 and 36 in each township in Gregory County "for the use of the common schools" and granting those sections to the State of South Dakota. S. Rep. No. 662, 57th Cong., 1st Sess. 1-2 (1902). The bill was passed in the Senate, but the House Committee on Indian Affairs rejected not only the provisions permitting free-homesteads but also the school lands provision, stating (H.R. Rep. No. 2099, 57th Cong., 1st Sess. 1 (1902)).

> The opinion of the committee is that this section is *not necessary*, as under *existing law* sections 16 and 36 would be granted to the State upon the extinguishment of the Indian title. [Emphasis added.]

The bill never reached the House floor for a vote (Pet. App. 16, n. 23).[15] When the Agreement for a sum

[14] A school lands provision was also contained in the Act of March 3, 1891, 26 Stat. 989, 1035, extinguishing the Lake Traverse Reservation. At that time, of course, this Court had not held that a State would be entitled to school sections out of public lands by the force of its Enabling Act alone, and Congress therefore included an express grant even in Acts providing for purchase of lands for a sum certain.

[15] The 1901 Agreement was an outright cession of Gregory County for a sum certain, which the Tribe conceded below would have extinguished the reservation status of the land and restored it to the public domain (Pet. App. 16). See *DeCoteau* v. *District Court, supra*, 420 U.S. at 447-449. The House Indian Affairs Committee understood that, under such circumsances, it was *not* necessary expressly to reserve Sections 16 and 36 for school purposes because the South Dakota Enabling Act of 1989 provided that those sections would automatically revert to the State when Indian title was extinguished. See 25 Stat. 676, 679, Section 10. The Senate Committee Report, supporting inclusion of the provision, was issued in March 1902, *before* this Court's decision in *Minnesota* v. *Hitchcock, supra*. The House Report was issued on May 17, 1902, after the *Hitchcock* decision. Congress "must be deemed to have known" that the exact issue it was dealing with was resolved by this Court in *Hitchcock*. *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 113. It was the House Report that accurately reflected existing law.

The court of appeals mistakenly relied (Pet. App. 29) on statements made by Senator Gamble in 1902 in favor of a school lands provision without noting that others regarded the provision as unnecessary. The court then juxtaposed those statements with statements made in 1904 (Pet. App. 30) after the sum certain method of payment had been discarded. The latter statements in fact simply emphasize the need to include school lands provisions when the uncertain-sum-in-trust method of payment is used.



certain was abandoned, however, subsequent bills included an express grant for school lands.

The question arose again in connection with the Act of 1910. Although the school lands provision was included in that Act without substantial debate, a similar provision in a bill to open lands in the Fort Berthold Reservation, North Dakota, was more fully discussed. The Fort Berthold bill, described as "practically in the same form" as the 1910 Rosebud Act (45 Cong. Rec. 5794 (1910)), provided for sales according to the uncertain-sum-in-trust method, except for Sections 16 and 36 which were to be purchased by the United States. After discussion of the school lands provision, Senator Jones of Washington stated (45 Cong. Rec. 6741 (1910)):

> I think I am thoroughly familiar with the terms of these various bills, and I am satified that these lands are *not restored to the public domain at all.* Their disposition is provided for in a special way. *The*

> *title of the Indians is recognized, and the lands are sold for the Indians.* They are to have the benefit.
>
> I am not going to object to the bill, and I am not going to object to the provisions in it, but I did want to put in the RECORD my judgment that we are under *no obligation to purchase section 16 and 36, because we are not restoring these surplus lands to the public domain.* [Emphasis added.]

Senator Jones clearly recognized that the 1910 Fort Berthold Act, which was "practically in the same form" as the 1910 Rosebud Act, did not restore any lands to the public domain, and that Congress chose voluntarily to include a grant of school lands to provide schools in the opened territory.[16] The Eighth Circuit has held that the 1910 Fort Berthold Act did not diminish the exterior boundary of that Reservation. *City of New Town, North Dakota* v. *United States,* 454 F. 2d 121. It is highly unlikely that Congress would have intended a different result in substantially identical legislation passed within the same month.

2. There is also no reason to believe that these lands, not restored to the public domain by Acts of Congress, were nevertheless restored by issuance of the Presidential proclamations opening the lands for settlement. At that point, the trust was still in full effect and the Indians had yet to receive any benefits under the particular Acts. Lands unsold or forfeited were to be restored to the Indians (presumably through the trust) and would not have been available for sale under the general laws. Thus they bear little resemblance to public lands.

This conclusion is fortified by *Ash Sheep Co.* v. *United States,* 252 U.S. 159. In 1899, the United States had negotiated an agreement with the Crow Tribe, by which the Tribe agreed to "cede, grant and relinquish" to the

[16] Since the opened areas where to be populated largely by white settlers, this action seems consistent with the purpose of the school lands provisions in the States' Enabling Acts.



United States, for a lump sum, a portion of its reservation in Montana, 33 Stat. 352-356. In 1904, however, the Congress unilaterally "amended and modified" the unratified 1899 Agreement to include an uncertain-sum-in-trust provision, 33 Stat. 361 (Section 6), and a trusteeship provision, 33 Stat. 361 (Section 8), while retaining the "cede, grant, and relinquish" language of the 1899 Agreement. The land was opened by Presidential Proclamation in 1906, 34 Stat. (Part III) 3200, and "[m]uch thereof ha[d] been disposed of * * *." *United States* v. *Ash Sheep Co.*, unpublished opinion, Brief of the United States as Amicus Curiae in Support of Petition for Hearing and Rehearing en Banc, p. 66 (filed in the court of appeals).

In 1913, the Ash Sheep Company sought to graze sheep on unallotted lands opened for settlement without compliance with Interior Department regulations, claiming that the Act of 1904 had diminished the Reservation and converted the land affected into "public land." This Court disagreed, stating (252 U.S. at 165-166):

> It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust. Minnesota* v. *Hitchcock,* 185 U.S. 373, 394, 398. * * *
>
> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, *and that they did not become "Public lands"*

> in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris*, 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352. * * *. [Emphasis added.]

Thus, the Presidential Proclamation of 1906 clearly had not converted the Indian lands into public lands outside the Reservation.

Furthermore, a bill (S. 4632) to give settlers additional time to make payments on lands within various North and South Dakota Reservations (including the Rosebud) was introduced and considered in the Sixty Third Congress in 1914. 51 Cong. Rec. 8790 (1914). During the House debate of May 18, 1914, the consequences of non-payment by the settlers was discussed (51 Cong. Rec. 8791 (1914)):

> Mr. FOSTER: I want to say to the gentleman from South Dakota, on the statement he makes that these lands will probably go back to the Government, and that these people are really in distress—
>
> Mr. MANN: The Government does not own these lands?
>
> Mr. BURKE of South Dakota: *The Government does not own them.* The Government is undertaking to dispose of these lands for the benefit of the Indians.
>
> Mr. FOSTER: Certainly. I understand.
>
> Mr. BURKE of South Dakota: *And instead of giving money to the Indians, under the agreement of 1889,* so far as these reservations in South Dakota are concerned, *the money goes into the Treasury,* and we appropriate it for the support and civilization of the Indians. [Emphasis added.]



The point was also emphasized later in the debate (*ibid.*):

> Mr. FOSTER: * * * if at the end of the time they do not desire to pay for them, the land goes back to the Government.
>
> Mr. MANN: *The land goes back to the Indians.* [Emphasis added.]

3. We believe that Congress expected by the Acts in question "to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished." *Mattz* v. *Arnett, supra,* 412 U.S. at 496. While it might have been possible to diminish the reservation *pro tanto* as each plot of land was actually sold, that system seems both illogical and impractical. Under such circumstances Indians could not be sure from day-to-day what lands remained within the Reservation (and thus on what lands they became subject to state jurisdiction, see U.S. Department of Interior, *Federal Indian Law* 510-511 (1958)), and jurisdiction could only be exercised in checkerboard fashion according to local plat books. That cumbersome system should not be readily implied. *Seymour* v. *Superintendent, supra,* 368 U.S. at 358. Furthermore, the risk of forfeitures was always present given South Dakota's climate; the difficulties would only be increased as land, previously sold and removed from the Reservation, reverted to the trust upon nonpayment. Finally, the Indians living on the opened portion might be denied benefits available to Indians living on a Reservation.

By contrast, preserving the Reservation until the trust allotments expired would present fewer problems. The acquisition of land would not be impeded, for the settlers would own their land in the same manner and would be generally subject to state civil and criminal jurisdiction. *United States* v. *McBratnew,* 104 U.S. 621; *New York*

*ex rel. Ray* v. *Martin,* 326 U.S. 496. The taxable base for the State and counties would be expanded, relieving the burdens of a locality previously inhabited largely by non-taxable Indians. At the same time, the Indians living on allotments would continue to receive needed federal benefits. While the State, of course, would not have jurisdiction over Indians on the Reservation, extension of State control over Indians has not generally been consistent with treatment of the Reservation by the Department of the Interior, as we next discuss.

## III. THE DEPARTMENT OF THE INTERIOR HAS ADMINISTERED THE ROSEBUD RESERVATION IN ACCORDANCE WITH THE BOUNDARIES ESTABLISHED IN 1889

Although the State of South Dakota has asserted dominion over the opened portions of the Rosebud Reservation, the territory within the original boundaries of 1889 has been recognized and administered as a Reservation by the Department of the Interior.

1. The process of alienating "surplus" Indian lands pursuant to the allotment policy ended with the passage of the Indian Reorganization Act of 1934 (48 Stat. 984). *Mattz* v. *Arnett, supra,* 412 U.S. at 496, n. 18. Under Section 3 of that Act, the Secretary of the Interior was authorized "to restore to tribal ownership the remaining surplus lands of any Indian Reservation heretofore opened * * *," 48 Stat. 984, and under Section 7, he was authorized to proclaim "new Indian reservations * * * or to add such lands to existing reservations." 48 Stat. 985. Congress made clear, however, that "[n]othing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads *upon the public domain outside the geographic boundaries* of any Indian reservation now existing or established hereafter" (48 Stat. 986; Section 8) (emphasis added).



The legislative history of the Act establishes that its provisions were directed particularly to "opened" portions of reservations. John Collier, Commissioner of Indian Affairs, whose agency was largely responsible for drafting the original bills, testified: [17]

> There have been presented to the House Indian Committee numerous land maps showing the condition of Indian-owned lands on allotted reservations. The Indian-owned lands are parcels belonging (a) to allottees and (b) to the heirs of deceased allottees. Both these classes of Indian-owned land are checker-boarded with white-owned land already lost to the Indians, and on many reservations the Indian-owned parcels are mere islands within a sea of white-owned property.

Before the House Committee Commissioner Collier testified [18]:

> * * * Alienation under allotment takes place in a spotty way *throughout the entire area within the reservation.* Indian land is not lost in solid blocks. It passed into white hands in scattered parcels which increased year by year until the remaining Indian lands are checker-boarded by white lands. *In many areas they have shrunk to mere dots on the map surrounded by large areas of white land.*

After passage of the Indian Reorganization Act of 1934 the unexpired trust period on all land allotted to Indians within reservations was indefinitely extended. The Secretary of the Interior was required to identify those Acts that "opened" portions of Indian Reservations but did not convert those lands into "public domain" (54

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[17] Hearings on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 18 (1934).

[18] Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 30-31 (1934) (emphasis added).

I.D. 559). The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that "[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation" (54 I.D. at 560.) However, the Secretary determined that a second type of disposition did not extinguish the Indian title and convert the land into public domain (*ibid.*):

> * * * [A]bout 1890 * * * there was adopted the plan of opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians. Under this plan the Indians were to be credited with the proceeds only as the lands were sold, the United States not to be bound to purchase any portion of the lands so opened. Undisposed of lands of this class remain the property of the Indians until disposed of as provided by law (*Ash Sheep Company* v. *United States*, 252 U.S. 159). Such lands are usually referred to as surplus lands of Indian reservations opened to public entry, and undoubtedly comprise the class of lands from which restorations to tribal ownership are to be made under the said Section 3, if in the public interest.[19]

[19] Respondents' discussion of a 1938 opinion by the Acting Solicitor (56 I.D. 330), concerning the Colorado Ute Reservation. Reply Brief for Respondents' in Opposition, pp. 26-27, takes an opposite viewpoint, relying on language that "[t]he phrase 'of any Indian reservation' must be used in section 3 to describe the character and location of the lands at the time they were opened to disposal under the public land laws," 56 I.D. at 333. No mention is made, however, of the language in Section 8 that "[n]othing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside the geographic boundaries of any Indian reservation now existing or established hereafter." That qualification, read in conjunction with Section 3, indicates that the only lands governed by the Indian Reorganization Act were lands located within an Indian



The Secretary then proceeded to identify "a list of Indians to receive the proceeds of sale only as the reservations where the lands have been opened, the tracts are disposed of" (54 I.D. at 561).[20] In addition to the three Rosebud Acts of 1904, 1907 and 1910 (*id.* at 562), the Secretary listed some twenty-six other reservations.[21] While those reservations have been the source of continual litigation, not one court has ever held that the Indian title to the land affected was extinguished by the applicable Act of Congress and the land converted to public domain. In fact, when the question presented was whether the reservation boundaries continued to exist undiminished in size, each court decided that they had.

reservation that were opened but not restored to the public domain. Such lands, as the Court held in *Seymour* and *Mattz*, were not removed from Indian and federal jurisdiction.

Moreover, the lands at issue in the Colorado Ute case did not contain any Indian allotments. Three bands of Utes occupied this Reservation prior to 1880; each was permitted to select allotments within the Reservation before it was opened by the 1880 Act, but because little arable land was available, the Uncompahgre and White River Utes were "voluntarily" removed to Utah. The Southern Utes were the only band to remain, and they selected allotments in the southern portion of the Reservation where the arable lands were located, *Ute Indians* v. *United States*, 45 Ct. Cl. 440, 449, leaving the northern portion unallotted. The discussion by the Acting Solicitor, therefore, must be read in the context of these unusual facts. See also *Confederated Bands of Ute Indians* v. *United States*, 100 Ct. Cl. 413, 423, 424-430.

[20] Approximately one month later, a supplemental order was issued which included additional reservations. It stated that (*id.* at 564) "as to those townsites any part of which remains unsold within such areas, it is hereby recommended that said order * * * be construed to apply to the extent of temporarily withholding from other disposition any unsold lots or portions of any such townsites * * *."

Thus, even townships, which by the 1930's would be populated by numerous non-Indians, were encompassed by this Interior Department order.

[21] See cases cited, note 10, *supra*.

On December 3, 1937, the Assistant Commissioner of Indian Affairs recommended to the Secretary of the Interior that, pursuant to Section 3 and Section 7 of the Indian Reorganization Act, certain undisposed surplus lands "of the Rosebud Reservation, South Dakota" should be restored to tribal ownership.[22] (App. A, *infra*). These lands included vacant lands totaling some 4,649.25 acres, and also "remaining vacant and undisposed * * * lots within the townsites of Wamblee, Witten and Wewela, in the opened portion of the said Rosebud Reservation, which townsites were established by the Department, pursuant to authority contained in the Act of March 2, 1907, *supra*." *Id.* at 2A. The lands encompassed by this recommendation were in Tripp County, opened by the 1907 Act. On January 12, 1938, the Secretary issued an

[22] The Secretary had previously approved the Constitution and Bylaws of the Rosebud Sioux Tribe (App. B, *infra*), pursuant to Section 16 (48 Stat. 987) of the Indian Reorganization Act. That section provides that "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws * * *." Article 1 of the Constitution defined the Tribe's jurisdiction as "the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889, and to such other lands as may hereafter be added thereto under any law of the United States, except as otherwise provided by law." The Rosebud Sioux Tribe has had a law and order system since 1877, supported by Congressional appropriations. 19 Stat. 254, 257 (Art. 9). Its police force was organized in 1879, *Report of Commissioner of Indian Affairs*, 1879, p. 40, and the extensive nature of its law and order system was recognized by this Court in *Ex parte Crow Dog*, 109 U.S. 556. See also *Report of Commissioner of Indian Affairs*, 1881, p. 54. Congress authorized the establishment of Tribal Courts in 1888, 25 Stat. 233, and the Rosebud law and order system continued to function thereafter. *Report of Commissioner of Indian Affairs*, 1897, p. 277 and *Report of Commissioner of Indian Affairs*, 1890, p. 381. After the approval of the Tribal Constitution in 1935, the Tribal Government was reorganized, and the Tribe has continued to exercise jurisdiction throughout the 1889 Reservation over Tribal members. See App. C, *infra*.



"Order of Restoration," restoring these lands to the Tribe (App. D, *infra*).[23]

2. Other actions confirm this view of the Rosebud Reservation as administered by the Department of the Interior. Department officials have repeatedly treated lands within Mellette, Tripp, Gregory and Lyman Counties, located within the 1889 Reservation boundaries, as reservation lands. This treatment belies the viewpoint of the court of appeals that Todd County alone has constituted the Rosebud Reservation since 1910.

For examples, in 1909, the Department, not having sold portions of the surplus lands made available by the 1904 Act to homesteaders, offered the remainder for sale at public auction. In a letter dated February 8, 1909, to the Commissioner of the General Land Office, the Secretary stated (37 I.D. 442-443):

> It is directed that *all that part of the Rosebud Indian reservation in Gregory County*, South Dakota, opened to settlement and entry by the act of April 23, 1904 (33 Stat. 254), which had not been entered prior to August 8, 1908, will be offered for sale * * *. [Emphasis added.]

The Department used similar language in 1913, directing sale of the lands opened by the 1907 Act:

> Sir: It is directed that all that *part of the Rosebud Indian Reservation in Tripp County*, South Dakota, opened to settlement and entry by the act of March

[23] On August 20, 1964, the Congress placed in trust status certain federal lands "on the Rosebud-Sioux Reservation," which included tract E. ½ of Section 35, T. 42 N., R. 33 W. 6th P.M. in Mellette County. 78 Stat. 560.

Restoration orders, comparable to the 1938 Rosebud Order, were issued for the Colville Reservation, pursuant to a Congressional directive, 70 Stat. 626 (1956), *Seymour* v. *Superintendent*, *supra*, 368 U.S. at 356, and the Klamath River Reservation, *Mattz* v. *Arnett*, 412 U.S. at 496, n. 17 and 505.

2, 1907 (34 Stat. 1230), which had not been disposed of on April 1, 1913, will be offered for sale at public auction * * * [42 I.D. 292].

Communications between Department officials are to the same effect. In April 1913, the Acting Commissioner of Indian Affairs, C. F. Hauke, submitted to the Superintendent of the Rosebud School a request for a report on the possible consequences of reorganizing the administrative structure of the Reservation. C.A. App. IV, Doc. 41.[24] Replying to the request, the Superintendent discussed, among other things, the status of Indian allotments in the various districts (or counties) opened for settlement. He stated (App. IV, Doc. 42, p. 4):

> *These two Districts* [Little White River and Black Pipe (both in Mellette County)] are the most troublesome of any of the Districts *on the Reservation.* The Bad Lands are located largely in these Districts which makes it difficult to go from place to place on account of the bad roads. The Cut Meat District [Todd County] has about 1,332 allotments with 299,120 acres, and a few over 1,000 Indians to look after. While it seems to be a large District, still there is but very little leasing of our Indian lands or allotments, *it being in the closed portion of our Reservation,* and the allotments are more compact with small farms in the District. The Agency has some over 1,200 Indians to look after, and is one of the largest Districts, but the farmer is assisted materially by being located in the Agency. [Emphasis added.][25]

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[24] As used in this brief," "C.A. App." refers to the appendix filed in the court of appeals.

[25] This correspondence shows that the distinction between "closed" and "opened" portions of the Reservation is that non-Indians were formally permitted by Congress to enter the Reservation in one portion (*i.e.*, "opened") while not others (*i.e.*, "closed"). Both parts, however, were administered as the Rosebud Reservation.



That same year, the Supervisor of Industries and Agriculture for the Rosebud Reservation submitted a report to the Indian Office in Washington, D.C., regarding his inspection of portions of the Reservation. He stated (C.A. App. IV, Doc. 44, pp. 1-2):

> The reservation is divided into farmers' districts, and I believe an honest effort is being made to induce the Indians to farm; * * * In the *Ponca District* [Gregory and Tripp counties] *at the east end of the reservation* there is a Teacher in Charge residing at the Milk's Camp Day School. His duties are exactly the same as those of the additional farmers.
>
> Practically all of the day school teachers have been raising good gardens for a considerable time. * * * Except in the *Ponca District* [Gregory and Tripp counties] *at the east end of the reservation,* which is a farming district, I do not consider the Rosebud country a farming country. [Emphasis added.]

Moreover, the Report of May 13, 1914, from the Supervisor at Rosebud to the Honorable Cato Sells, Commissioner of Indian Affairs (App. IV, Doc. 51, p. 3), states:

> The [Rosebud] *reservation* is divided into seven farmer districts, each presided over by a farmer paid at a rate of $900 per annum, except the *Ponca district* [Gregory and Tripp counties] in the *extreme eastern end of the reservation,* which is presided over by a teacher-in-charge at $1000 per annum. [Emphasis added.]

Thus, the contemporaneous view of the Department officials was that the reservation boundaries were not changed by the Acts of 1904, 1907 and 1910.

More recently, in 1939, the Division of Forestry and Grazing of the Rosebud Reservation forwarded to the Commissioner of Indian Affairs a "map of the Rosebud Indian Reservation showing different types of roads" and

identifying important landmarks regarding the location of the roads (*e.g.*, schools, fire look-out stations) (App. E, *infra*). The letter identifies roads and trails constructed by either the County or the Indian Service in Mellette, Tripp, Lyman and Gregory Counties; the location of new schools in Black Pipe (Mellette); the location of fire look-out tower sites in Cedar Butte (Mellette); and the construction of government and private telephone lines in Mellette and Tripp Counties. These facilities all were considered part of the Reservation.

In 1942, the Interior Department's Fish and Wildlife Service undertook a wildlife survey on the Reservation in order to assist the Tribe in managing their resources (App. F, *infra*). The Report on the survey was completed in August 1942 and transmitted to the Commissioner of Indian Affairs in September. The Report contains this description of the Rosebud Reservation (*id.* at 39A-40A):

> The *entire reservation* is included in Tripp, Gregory, Mellette, and Todd Counties, and covers a gross area of 3,555,833 acres. Alienated white lands total 2,468,888 acres of this area. Most of the field work was conducted on the *so called* "Diminished Reservation" in Todd County. This area, including alienated land, totals approximately 894,080 acres. Much of this is checkerboarded although there are some large solid blocks of Indian land. The largest percentage of the diminished reservation is Indian owned. Approximately 7,000 Indians are enrolled in the tribe. [Emphasis added.]

The Bureau of Indian Affairs continued, prior to this law suit, to administer all five counties as part of the Rosebud Reservation. From 1969 through 1974 requests for Congressional appropriations were based on population statistics which included all Indians living within the exterior boundaries of the 1889 Reservation, and clearly distinguished those from a lesser number living off, but



near the Reservation.[26] Various social services were provided to Indians living in all these counties, including child welfare and burial assistance; a BIA outpatient clinic is located in Mellette and Tripp Counties; and housing was provided by BIA or Tribal funding since 1963. Moreover, the Department of Housing and Urban Development, which makes grants only where a tribe has authority to act as a "governmental entity" or "public body" (42 U.S.C. 1460(h)), has been providing financial assistance to the Tribe (Memorandum of the United States as Amicus Curiae supporting petition for certiorari, p. 11). See also Opinion of the Field Solicitor on the exterior boundaries of the Rosebud Reservation in 1972 (C.A. App. IV, Doc. 56).

The agency responsible for administering the Rosebud Reservation, therefore, has generally regarded the original reservation boundaries as unchanged by the Acts of 1904, 1907, 1910. That understanding is entitled to more weight than it was accorded by the court of appeals, *Mattz* v. *Arnett, supra,* 412 U.S. at 505, and, we believe, is more instructive than the ambiguous legislative history discussed in the following section.

## IV. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS DID NOT CONSIDER QUESTIONS OF JURISDICTION AND IS THEREFORE OF MARGINAL BENEFIT IN THIS CASE

The court of appeals gave primary, if not conclusive, weight to the legislative history of the three Acts (Pet. App. 9-60).[27] While legislative history may be useful in these inquiries, *DeCoteau, supra,* 420 U.S. at 444-445,

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[26] See App. A, Brief of the United States as *Amicus Curiae* in the court of appeals below.

[27] A law journal article, written in part by present counsel for South Dakota, had previously reviewed the legislative history in some detail and urged the result reached below. Comment, *New Town, et al.: The Future of an Illusion*, 18 S.D. L. Rev. 85 (1973).

we do not believe the history in this case merits the emphasis it enjoyed below. For Congress, in passing these three Acts, at no time addressed the question of jurisdiction. Page after page of the legislative history shows that Congress was concerned with *land* not *jurisdiction*. Thus, that history is at best a slender reed on which to support extinction of most of the Rosebud Reservation.

During the early 1900's there was no reason for Congress to be greatly concerned about jurisdiction. The principal reason for opening the Rosebud Reservation, as the court of appeals recognized (Pet. App. 9, 34, 44), was the desire of settlers for land. This desire was compatible with the interests of States having great reservations within their boundaries, who sought a broader tax base through increased land ownership by non-Indians (*e.g.*, A. 276). Both objectives could be accomplished either by purchase for a lump sum or by purchase through the uncertain-sum-in-trust method. At the same time, the Indians would be exposed to new, presumably more civilized, ideas that would hasten their assimilation into our culture. As that assimilation occurred, and the trust period on allotted lands gradually expired, the Reservations could be abolished. *Mattz, supra,* 412 U.S. at 496.

The debates reflect Congress' lack of attention to jurisdictional matters. Throughout the consideration of these three Acts, Congress discussed the desirability of the lands, the method of payment, the price to be paid by settlers, the need for school lands provisions, and many other matters, but not once addressed the issue of criminal and civil jurisdiction within the opened Reservation.[28] Although the court of appeals relied on scattered remarks

[28] Jurisdiction is mentioned, albeit tangentially, in the debate on the liquor provision in the 1910 Act. That provision made all land in Mellette County subject to the liquor laws applicable in "Indian Country." Although the courts below suggested that the provision would be unnecessary if the Reservation were continued (Pet. App. 56-58, 102-103), that suggestion is erroneous. As the debates show, 45 Cong. Rec. 5460-5464 (1910), members of Congress were fully aware of this Court's decision in *In re Heff*, 197 U.S. 488, holding that Indian allottees were subject to *state* liquor laws. While opponents of the provision believed that state jurisdiction was sufficient, supporters noted that dependency on state liquor laws presented a grave risk to Indian well-being (45 Cong. Rec. 5460-5464 (1910)). Thus federal control was expressly continued for twenty-five years, the trust period on Indian allotments, at which time aboltion of the Reservation could be considered.



that suggest abolition of the Reservation, these remarks are necessarily taken from discussions on different subjects and are often contradicted by other references of a similar nature. While exhaustive citation is not necessary, a brief review of materials not cited by the courts of appeals should demonstrate the uncertainty surrounding the legislative history in this case.

1. The view of the legislative history taken by the court of appeals proceeds from the assumption that the Acts of 1904, 1907, and 1910 were extensions of the unratified 1901 Agreement (Pet. App. 22, 23, 25, 38, 40, 48). Although we agree that the 1901 Agreement and the three Acts had a common purpose of providing Indian lands to white settlers, the differences between them merit further attention.

In 1901, the Rosebud Sioux Tribe agreed by a three-fourths majority of the adult male population to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" in all that part of the Reservation located in Gregory County, South Dakota, remaining unallotted, in return for a lump sum payment of $1,040,000 (Pet. App. 14 and 15, n. 21). This agreement, which was negotiated by the Interior Department's Inspector, James McLaughlin, was to be effective "when accepted and ratified by the Congress of the United States" (*Id.* at 15).[29] That ratification of course never occurred.

[29] Approval of three fourths of all the adult male Indians, before an agrement was considered valid, was required by the Treaty of 1868, 15 Stat. 635, 639 (Art. XII) (Pet. App. 14, n. 20).

Three years later, after several previous bills had failed to pass, a new bill was introduced which unilaterally "amended and modified" the 1901 Agreement. The primary amendments were that (1) the Indians were not guaranteed a lump sum consideration, except for Sections 16 and 36 (school sections), but were to be paid as lands were actually sold (Section 6, Pet. App. 120); (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. App. 118 with Art. III, Pet. App. 115-116). In addition, the 1904 bill eliminated any reference to tribal consent by three-quarters of the male adults, and included a provision granting Sections 16 and 36 to the State for common school purposes (Section 4, Pet. App. 120). It was enacted on April 23, 1904, 33 Stat. 254.[30]

Although the court of appeals stated that "[t]he 1904 Act, incorporating the entire text of the 1901 Agreement (save for the lump-sum provision) passed under the circumstances [previously discussed], was obviously an outgrowth of and a continuation of the objectives of the 1901 Agreement" (Pet. App. 25), that conclusion, while technically correct, is misleading. The 1901 Agreement itself does not evidence a specific intention to cut down reservation boundaries; at most, that intention could be presumed from the bilateral nature of the agreement and by the provisions for outright purchase of the lands for an indicated sum. *DeCouteau, supra.* That presumption is unavailing, however, once the nature of the agreement and the method of payment are changed. The objective of securing new lands for non-Indian settlers surely was

[30] Despite these numerous and material changes the court of appeals somehow concluded that the 1904 Act "amended the 1901 Agreement solely with respect to the method of payment" (Pet. App. 23).



continued, but that is not material to the question of jurisdiction over the settled lands.

2. The court of appeals also proceeded on the assumption that the terms "reservation" and "diminished reservation" had one settled, precise meaning throughout the legislative history. Thus, the court relied heavily on various references to the "reservation" and the "diminished reservation" (Pet. App. 12, 13, 14, 26-28, 39, 40-41, 44, 45, 51-52, 54, 57, 58, 59) to show that the exterior boundaries of the Rosebud Reservation had been cut back. Consideration of similar references in the legislative history, however, indicates that the terms were often used in shorthand fashion without the precision that the court of appeals supposed.

For example, the term "diminished reservation," as used in the 1910 Act, appears to include not only Todd County (the closed portion) but also Mellette County (the portion to be opened). The May 30, 1910 Rosebud Act provides in part, 36 Stat. 449 (Section 1):

> [A]ny Indians to whom *allotments* have been made *on the tract to be ceded* [Mellette County] may, in case they elect to do so *before* said lands are offered for sale, relinquish same and select allotments in lieu thereof on the *diminished reservation* * * *. [Emphasis added.]

Section 2 of the Act, however, directs the Secretary to dispose of the unallotted lands in Mellette County after a presidential proclamation, provided (*ibid*):

> That prior to said proclamation the *allotments within the portion* of the said Rosebud Reservation *to be disposed of* [Mellette County] as prescribed herein shall have been completed * * *. [Emphasis added.]

Since the Indians could select new allotments in Mellette County prior to the presidential proclamation, as well as in Todd County, "diminished reservation" seems to refer not merely to the closed portion of the Reserva-

tion but to the " 'area of the reservation * * * diminished in size by reason of the settlement of the unalloted lands by non-Indians.' " *Putnam* v. *United States,* 248 F. 2d 292, 295 (C.A. 8). In *United States ex rel. Condon* v. *Erickson,* 478 F. 2d 684, 687 (C.A. 8), the court of appeals recognized that a similar use of the term could mean that "the reservation * * * retained its original exterior boundaries even though the portion held by Indians was diminished by virtue of the sale of lands within the boundaries to outsiders. The court then continued: "Indeed, this would be consistent with 18 U.S.C. § 1151 defining Indian Country as lands within the limits of a reservation *notwithstanding the issuance of any patent*" (*ibid.*; emphasis in original).[31]

At other times, "diminished reservation" seems to mean only the closed portion of the Reseravtion. The Report

[31] In a November 12, 1910, letter regarding the 1910 Act, the Assistant Commissioner of Indian Affairs stated (C.A. App. IV. Doc. 40B):

"The diminished reservation,—that is, the lands remaining *after* the allotments [to Indians] and sale of lands [to homesteaders] referred to, *will consist of about 40 townships,* which may be used to provide allotments until such time as there are no unallotted lands therein." [Emphasis added.]

In 1910 Mellette County consisted of 837,125 acres (36 full townships) and a number of irregularly sized townships. Thousands of these acres had already been allotted to Indians *prior* to the opening, and could not "be used to provide allotments * * *" *after* the opening. To find "about 40 townships" available for allotment, therefore, it would be necessary go beyond Mellette County.

In 1911, a few months after Mellette County was opened to settlement, there existed in Todd County less than 220,000 acres that could "be used to provide allotments * * *" to Indians, S. Rep. No. 1166, 62d Cong., 3d Sess. 4 (1913), the remainder having long since been allotted or reserved for agency and school purposes. The remaining 700,000 acres referred to by the Assistant Commissioner appears to have been an estimate from existing Department records of the land remaining throughout the entire 1889 Reservation for the purpose of allotment, "diminished" by the lands already alloted to Indians or occupied by homesteaders.



prepared by the Fish and Wildlife Service in 1942 (App. F, *infra,* at 39A), for example, states that "[t]he entire [Rosebud] reservation is included in Tripp, Gregory, Mellette, and Todd Counties," and notes that "[m]ost of the field work was conducted on the so called 'Diminished Reservation' in Todd County." This is the same portion of the Reservation that the Superintendent of Rosebud School described as "the closed portion of our Reservation * * *" (*supra,* p. 35).

Construction of the term "reservation" also leads in various directions. While some references to the Rosebud "reservation" appear compatible with the court of appeals' analysis, other references do not. Thus, within a year after the 1904 Act was passed, the homesteaders in Gregory County petitioned Congress for an extension of time to establish their residence upon lands opened to settlement. The Senate and House Committee Reports both refer to the lands in question as *"lands within the confines of that part of the Rosebud Indian Reservation* thrown open to entry * * *" (emphasis added). H.R. Rep. No. 4198, 58th Cong., 3d Sess. (1905); S. Rep. No. 2760, 58th Cong., 3d Sess. (1905) And, after describing the need for the legislation in light of bad climatic conditions causing delays in payments by homesteaders, the Senate Committee Report states (*id.* at 2):

> A further fact which influences the committee in making a favorable report is that these settlers are under conditions different to those affecting the ordinary homestead settler. Entrymen on the reservations in question have to pay $4 an acre in the case of the Rosebud Reservation * * *.

This legislation became law on February 7, 1905, 33 Stat. 700.

On March 3, 1909, Congress enacted an appropriation for the Indian Department for the fiscal year ending June 30, 1910. 35 Stat. 781. Under Section II of the

Act, Congress made appropriations for reservations within various states, including South Dakota. 35 Stat. 808. Additionally, Congress authorized the Secretary to permit the establishment of catholic missions "on the Rosebud Reservation." 35 Stat. 809. The missions were to be located as follows (*ibid.*):

> *On the Rosebud Reservation,* at or near Saint Francis Mission * * *; also, at or near Red Leaf Camp * * *; also, at or near Oak Creek * * ; also, at or near Antelope Creek * * *; also, at or near Little White River * * *; *also, at or near Ponca Creek.* [Emphasis added.]

Ponca Creek is located in Gregory County, opened by the Act of 1904.

In 1911 Congress had before it a bill for relief of settlers in the area opened by the Act of 1907. Representative Stephens, who called up the bill, described it as a "bill (H.R. 13044) extending the time of payment to certain homesteaders in the Rosebud and other Indian reservations in South and North Dakota * * *" (47 Cong. Rec. 3840 (1911)) and then stated (*id.* at 3841):

> Mr. Speaker, we have gone at some length into the question of the great drought-striken country of the West in the bill which has already passed the House and we have shown the House beyond all question that a severe drought has extended all over the West, including South Dakota. *The Rosebud Reservation, where these lands are situated,* is now, in the main, in the hands of settlers * * *. [Emphasis added.]

The bill became law on April 17, 1911, 37 Stat. 21.

In 1918, Mr. Gandy, a representative from South Dakota, introduced a bill (H.R. 12082) "authorizing the sale of certain lands in South Dakota for cemetery purposes." 56 Cong. Rec. 6469 (1918). The bill was referred to the Committee on Indian Affairs, which reported (H.R. Rep. No. 742, 65th Cong., 2d Sess. 1 (1918)):



> This is a bill to authorize the sale of 10 acres of tribal land *on Rosebud Indian Reservation in Mellette County S. Dak., and belonging to the Rosebud Tribe of Indians,* to the White River Cemetery Co. * * * It is provided that the Secretary of the Interior shall sell the land * * * and that the money received shall be deposited in the Treasury of the United States to the credit of the Rosebud Tribe of Indians. [Emphasis added.]

In the following year, during debate on a bill to pay for fire damages on the Todd County portion of the Rosebud Reservation, 58 Cong. Rec. 4933 (1919), Mr. Gandy observed that "[t]he Rosebud Reservation embraces about 7,000 square miles." However, Todd County, which the Eighth Circuit found to be the *only* portion of the original Rosebud Reservation remaining in 1919, is less than 1,500 square miles (approximately 800,000 acres). The 1889 Rosebud Reservation, undiminished in size, is in excess of 5,000 square miles (3,228,160 acres).

In December 1910, the Town of White River, located in Mellette County, South Dakota, sought approval from the Federal Power Commission for construction of an electric power line across Indian lands. The FPC notified the Town that if "tribal Indian lands are to be crossed * * * prior approval of the proper reservation authorities" was required (App. G, *infra,* p. 41A). The FPC then notified the Secretary of the Interior that the "Town of White River, South Dakota, has filed with the Commission an application for license * * * affecting lands of the United States within the Rosebud Indian Reservation" (App. G, *infra,* p. 42A). Thus, both the Town of White River and the FPC acknowledged that power line construction in Mellette County would affect lands within the Reservation and was subject to approval of "reservation authorities."

In June, 1941, the United States filed a Declaration of Taking in the United States District Court for the District of South Dakota, in order to acquire land "for the use of the United States of America, * * * in connection *with the Two Kettle Project on the Rosebud Indian Reservation* in South Dakota * * *" (App. II, *infra*, pp. 44A, 50A) (emphasis added.) The lands acquired were described by the District Court as (*id.* at 50A)

> * * * containing 610.10 acres of land, more or less, *in Mellette County,* South Dakota, designated as Tract No. 189 of the Two Kettle Project *on the Rosebud Indian Reservation* [Emphasis added.]

The District Court entered its Findings of Fact and Conclusions of Law, as well as its final judgment, on December 12, 1941 (*id.* at 44A).

In 1945 Senator Bushfield, a Senator from South Dakota, introduced a bill (S. 1564) directing the Secretary of the Interior to issue a fee patent to Shadrick Ponca, a Rosebud Sioux Indian. The relevant Committee Report stated (S. Rep. No. 1442, 79th Cong., 2d Sess. 1 (1946)):

> Shadrick Ponca, is the sole heir of his deceased mother, Millie or Wing Ponca, who bequeathed to him her allotted lands *on the Rosebud Indian Reservation, S. Dak., described in this bill, which lands are situated in Gregory County, S. Dak.,* a distance of more than 50 miles from applicant's home in the village of Okreek, in Todd County, S. Dak., where applicant, Shadrick Ponca, lives in his own home * * *[32]

[32] The bill was passed by the Senate on June 14, 1946, 92 Cong. Rec. 6920, introduced into the House, 92 Cong. Rec. Rec .7120, and referred to the House Committee on Indian Affairs. 92 Cong. Rec. 7399-7400. There was no further action during the 79th Congress, and although the South Dakota Senator introduced it again in the 80th Congress, 93 Cong. Rec. 3219 (1947), it did not become law.



Two years later, Senator Bushfield asked the Commissioner of Indian Affairs for a report on the application of Charlotte Gordon Odden for a patent in fee covering her allotment in Tripp County, South Dakota. The Commissioner stated in his letter of August 21, 1947 (App. I, *infra*):

> Receipt is acknowledged of your letter of August 11 about Mrs. Charlotte Gordon Odden's application for a patent in fee covering her 160-acre allotment, No. 4248, *on the Rosebud Reservation, described as* the SW ¼ sec. 11, T. 96N., R. 74W., 5th P.M., *Tripp County, South Dakota.* [Emphasis added.]

The inconsistency in these references is not surprising in view of the fact, discussed previously, that Congress did not squarely face the question of jurisdiction over the opened lands; other more controversial matters claimed its attention. It is inappropriate, therefore, to select certain statements from the mass of ambiguous materials and draw inferences from these, as the courts below did.[33]

[33] We also think the court of appeals misapprehended the significance of the fact that non-Indians and Indians live within the Reservation and utilize State and Federal facilities or benefits. Neither fact is inconsistent with the continued existence of the Rosebud Reservation. Only 19% of the Flathead Tribe live within the Flathead Reservation in Montana. *Confederated Salish and Kootenai Tribes* v. *Namen,* 380 F. Supp. 452, 457, n. 5 (D. Mont.), and considerable expenditures by both the State and Federal governments within the area provide benefits to all residents. *Confederated Salish and Kootenai Tribes* v. *Moe,* 392 F. Supp. 1297, 1313-1314 (D. Mont.). Similarly, the entire City of Tacoma, Washington, is within an Indian Reservation (Brief of the United States as Amicus Curiae in Support of Petition for Rehearing and Rehearing en Banc, p. 95 (filed in court of appeal); see also *United States* v. *Washington,* 496 F.2d 620 (C.A. 9), certiorari denied, 419 U.S. 1032), and this Court recognized the presence of non-Indians within the Colville Reservation. *Seymour* v. *Superintendent, supra,* 368 U.S. at 358-359. This pattern represents nothing more than the logical consequence of Acts "opening" Indian reservations to white settlement around the turn of the century.

Read in its entirety, the legislative history does not show a clear intent to cut back the Reservation boundaries.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

PETER R. TAFT,
*Assistant Attorney General.*

H. BARTOW FARR,
*Assistant to the Solicitor General.*

EDMUND B. CLARK,
NEIL T. PROTO,
*Attorneys.*

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No. 92-6281

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

ROBERT P. HAGEN,

Petitioner,

v.

STATE OF UTAH,

Respondent.

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ON WRIT OF CERTIORARI TO THE
UTAH SUPREME COURT

# BRIEF FOR ROOSEVELT CITY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT STATE OF UTAH

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Craig M. Bunnell
Craig M. Bunnell, P.C.
Roosevelt City Attorney
(Counsel of Record)
190 North Carbon Ave.
Price, Utah 84501
(801) 637-6722

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Roosevelt City Attorney
**(Counsel of Record)**
190 North Carbon Ave.
Price, Utah 84501
(801) 637-6722

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Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985) . . . . . 12, 18

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32 Stat. 245, Act of May 27, 1902 (Uintah Act) . . . . . 4

32 Stat. 982, Act of March 3, 1903 . . . . . 4

33 Stat 1048, Act of March 3, 1905 . . . . . 4

33 Stat. 189, Act of April 21, 1904 . . . . . 4


**MISCELLANEOUS AUTHORITIES CITED:**


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## INTEREST OF AMICUS CURIAE

Roosevelt City is the largest and most densely populated of the non-Trust and predominantly non-Indian communities and municipalities within the historic exterior boundaries of the Uintah Valley Reservation portion of what is known today as the Uintah and Ouray Indian Reservation. Roosevelt City is the economic hub of the

area at issue and provides crucial public and private services to the surrounding communities and county enclaves, including the predominantly Indian and Ute Tribal communities of Fort Duchesne, Whiterocks, and Randlett (which are located on Indian Trust Land).

The purpose of this amicus curiae brief is not to restate the sound legal arguments of the State of Utah and the local Counties (which arguments this amicus curiae fully supports), however, it is to illustrate and emphasize the key geographic, demographic, and problematic realties of the area at issue. Indian and non-Indian relations have been relatively genuine and peaceable over the years, and it is not the intent of Roosevelt City to strain relations any further. It is the City's intent to merely describe actual characteristics and conditions. The Court should refer to the enhanced portion of a Bureau of Land Management Land Status Map attached to this brief as Appendix A for its review and careful study in understanding the area in question and the adverse impact this jurisdictional boundary issue has on the 85 percent majority non-Indian population. See also JA 185.

## SUMMARY OF ARGUMENT

From late 1905 until the mid-1980s, non-Indian settlers and immigrants populated the Uintah Valley[1] with the understanding, expectation and the precedent-setting

[1] This name reference shall be used for the convenience of the Court. Local residents commonly refer to the area as the "Uintah Basin" as a result of certain geological characteristics unique to the area.



legal conclusion that the land they had settled and local economy they had developed was not within an Indian Reservation or governed jurisdictionally by the Ute Tribe. Non-Indian residents have relied on that understanding and expectation for over four generations. The non-Indian population is now more than five times that of the Indian population and has established municipalities, communities, infrastructure, and an economic base responsibly serving the entire area. Extending the jurisdictional boundaries of the Reservation so as to envelope over 1.4 million acres of non-Trust Land (70 percent of all the land in the Uintah Valley) and those communities settled, developed, owned, and governed by the non-Indian majority, and placing Roosevelt City, as well as all the other non-Indian communities, within the jurisdictional realm and governing powers of the Ute Tribe, is contrary to sound public policy and contrary to basic principles of democracy.

## ARGUMENT

### I. Important Geographic and Demographic Factors Manifest the Federal Government's Intent for Diminishing the Original Reservation Boundary and Justify a Sound Public Policy Reason to Decide in Favor of Diminishment.

The area at issue is located in Northeastern Utah and within what was originally known and set apart (in 1861) as the Uintah Valley Reservation--the western portion of what is referred to today as the Uintah and

Ouray Reservation (see App. A, Map). After these lands were allotted to the Indians and opened for non-Indian homesteading as public domain in 1902 through 1905, the intentions of the Federal Government were manifest and expectations of settlers and the Indians set into motion.[2]

Congressional intent is of paramount importance in determining the diminishment issue in this case. In determining such intent, the consideration of relevant geographic and demographic information is imperative. This information manifests the overall understanding and expectations of the local residents and businesses, as well as the degree of reliance on that understanding. This Court in Solem v. Bartlett, 465 U.S. 463 (1984), referred to the importance of such information by using the following standard of consideration:

> ....When events surrounding the passage of a surplus land Act ...unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.... [W]e look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.

Id. at 471-72. See also, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977).

This Court, in deciding in favor of diminishment in Rosebud, was emphatic about the disputed area's demographic characteristics:

> The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges. We are simply unable to conclude that the intent of the 1904 act was other than to disestablish.

Rosebud, 430 U.S. at 604-05 (emphasis added). As will be shown hereafter, the demographic and geographic situation of the Uintah Valley is as demonstrative and obvious as that in Rosebud. By contrast, this Court, in finding against diminishment in Solem, made it a point of emphasis in support thereof that the Cheyenne River Sioux Tribe had a strong and responsible presence in the disputed

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[2] Reference is made to the following Acts of Congress, dealt with in greater detail in the State of Utah's brief and in State v. Perank, 191 Utah Adv. Rep. 5 (1992): 32 Stat. 245, Act of May 27, 1902 (Uintah Act); 32 Stat. 982, Act of March 3, 1903; 33 Stat. 189, Act of April 21, 1904; 33 Stat 1048, Act of March 3, 1905; and Presidential Proclamation of July 14, 1905, 345 Stat. 3119, III Kapp. 605 (1913).

area--such as the largest proportion of the overall population, effective law enforcement services and social services, and as being an area of obvious Indian character and semblance. Solem, 465 U.S. at 480.

The Indian lands of the Uintah Valley became known as the Indian Trust Lands, amounting to approximately 566,000 acres or 27.7 percent of the current land holdings (see App. A, Map). "Checkerboarding"[3] is not a problem in the Uintah Valley, whereas the Trust Lands are, for the most part, concentrated into well-defined areas and have become, over the last eighty years, easily recognized and quite well known to non-tribal managers and officials (App. A, Map).[4] The northern section of Trust Lands are concentrated in the largely unpopulated canyon mouths and foothills of the Uinta Mountains, bordered on the north by the vast Ashley National Forest and High Uintas Primitive Area. The central and southern sections of Trust Lands are also concentrated along water courses and tributaries and in largely unpopulated areas, except for the small and clearly defined Ute Indian communities of Fort Duchesne, Whiterocks, and Randlett, located on Trust Lands.[5] The remaining 72.3 percent of the Uintah Valley is comprised of approximately 400,000 acres of patented fee lands; a 1,010,000-acre forest reserve; a 56,000-acre Strawberry River Reclamation reserve; and a 7,040-acre Gilsonite Strip reserve. Of course, the 400,000 acres of fee lands are at the heart of this jurisdictional controversy.

In mid-1905 and pursuant to the 1902 Act as amended, Theodore Roosevelt proclaimed that the unallotted Indian lands be "restored to the public domain" and be opened up for homesteading and the establishment of townsites. Presidential Proclamation of July 14, 1905, 34 Stat. 3119-20. Not unlike most of the more than twenty

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[3] "Checkerboard" land patterns are generally just as the name implies. "Checkerboard jurisdiction is the colloquial name given to a pattern of jurisdiction in which the jurisdictional status of the land varies from parcel to parcel. It arises, naturally, in the context of an Indian reservation, where state, federal, and tribal jurisdictions are intermingled." Confederated Tribes v. County of Yakima, 903 F.2d 1207, 1216 (9th Cir. 1990). A more typical example of an actual checkerboard pattern are the Utah State school trust lands, which make this type of pattern in the Uintah County/Uncompahgre Reservation area (see App. A, Map).

This Court has allowed checkerboard jurisdiction "to stand in cases such as DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, and United States v. Pelican, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914)." Pittsburgh & Midway Coal Min. Co. v. Yazzie, 909 F.2d 1387, 1421 (10th Cir. 1990). This Court also "in Montana and Brendale authorized such 'checkerboard' jurisdiction by mandating that neighboring tracts of land be subject to different regulatory authorities on the basis of type of ownership, or nature of the land." State of South Dakota v. Bourland, 949 F.2d 984, 996 (8th Cir. 1991). In fact, the Court has held that "checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution." Washington v. Yakima Indian Nation, 439 U.S. 463, 502 (1979).

[4] In fact, the Ute Tribe posts signs identifying their Trust Lands at many publicly accessible locations.

[5] Whereas the headquarters and governmental agencies for the Ute Tribe are located in Fort Duchesne, the area's Indian population is concentrated in and around these three communities. The populations of these communities are 665, 312 and 283 respectively. U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics: Utah, 1990 CPH-1-46, Table 15, p. 69. These communities are comprised of predominantly Ute Tribal members.

non-Indian settlements in the Uintah Valley, the townsite of Roosevelt City was first settled in late 1905. Roosevelt City is located near the border of Duchesne and Uintah Counties and on U.S. Highway 40. Like Roosevelt City, all of the other non-Trust Land communities in this region are predominantly, if not entirely, non-Indian and located separate and apart from the Indian Trust Lands, and along state and county-funded and maintained highways and roadways (App. A, Map). The Uintah Valley area has an 85 percent non-Indian population and a 15 percent Indian population. U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics: Utah, 1990 CPH-1-46, Table 17, p. 73.[6] This almost 5:1 population ratio is more than reflective of the land use and economic makeup of the area. To illustrate, of Roosevelt City's 3,915 population, 7.5 percent or less is comprised of Indians.[7] Similar scenarios exist in nearly all of the other area communities located on the non-Trust Lands.[8]

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[6] The 1990 Census shows a 14,574 non-Indian population and 2,650 Indian population. This Indian population figure includes those Indians who are Ute Tribal members. Therefore, a greater population disparity presumably exists when concerning non-Tribal versus Tribal members. The Ute Tribe will not disclose actual Tribal Membership figures to this amicus curiae, despite several requests for such information. However, current estimates suggest a non-Indian population of approximately 18,000 and Indian population of 3,000. No matter which set of numbers are used, the population percentages and ratios remain about the same.

[7] Id. at Table 15, p. 68, and Table 3, p. 13.

[8] For example, Duchesne City (1,308 pop.) has a less than 1 percent Indian population; the town of Neola (511 pop.) has a 12.5 percent Indian population; the town of Altamont (165 pop.) has a 3.5 percent Indian population; and Myton City (468 pop.) has an 18 percent Indian population. Again, very few of these Indians are Ute Tribal members. Id. at Table 3, p. 13.



Unlike the small Indian population concentrated in a very small area of the Indian Trust Lands, the much larger non-Indian population is concentrated throughout the 400,000 acres of fee land.[9] The fee-land area has been gradually, over the years, developed and covered with farms, ranches, oil and gas production facilities, water treatment and conveyance facilities, recreational facilities, and airport facilities--in addition to the municipalities dotting the area. The patented fee-land area has a population density of approximately 23 persons per square mile (27.4 acres per person), whereas the Indian Trust Land area has a population density of only 3 persons per square mile (213.6 acres per person).

The whole area relies heavily on and is driven by the oil and gas industry for its tax base and a large amount of its employment.[10] The Pennzoil Oil Refinery, one of the largest private employers in the area, is located adjacent to the City. Roosevelt City is the most substantive commercial and business sector of the Uintah Valley. Of the 350 businesses and industries in Roosevelt, only two are known to be owned and operated by Ute Tribal

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[9] The non-Indian population on the fee land area alone is approximately 91 percent of the total population. Id. at Table 13, pp. 13 and 16 (for Duchesne and Uintah Counties).

[10] The Ute Tribe is greatly dependent upon lease royalties and revenues and Roosevelt City's business sector to support its government agencies and its members.

members.[11] Non-agricultural employment is concentrated in the oil and gas industry, trade, and government sectors. Utah Dept. of Employment Security, Labor Market Information and Research, Summary of Key Labor Market Information For Utah, p. 16 (July 1992). The area's Indian population makes up about 10 percent of the total employed labor force and 35 percent of the total unemployed labor force. U.S. Department of Commerce, Bureau of Census, 1990 Census of Population and Housing, Summary Tape File 3A. Of this population's own 798-person labor force, 29 percent (228) are unemployed. Id.

The public and private sectors of Roosevelt City, Duchesne County, and Uintah County, provide most of the public services and facilities for the entire non-Trust Land area and some of the Trust Land area--such as roads, water, sewer, electricity, health care, education, recreation, fire protection, and law enforcement.[12] Whereas Roosevelt City is the largest commercial sector in the area, tribal members do much of their commercial business activities (shopping, banking, entertainment, etc.) in Roosevelt City. Roosevelt City's public and private services and facilities are provided for all area residents, including Ute Tribal members. Tribal members are not required to and generally do not pay State sales tax, nor do they pay property taxes on Trust-held Lands. Roosevelt City provides fire

[11] These two businesses are on-premises liquor establishments. Most of the Ute Tribe member-owned and operated businesses are located primarily in or around Fort Duchesne and on Trust Lands.

[12] The Ute Tribe provides most of its own public services to its members on Trust Lands, funded by the Ute Tribe or Federal Government.



protection on Indian populated Trust Lands, for very little remuneration from the Ute Tribe. Roosevelt City's Police Department provides law enforcement assistance to the Ute Tribe and Bureau of Indian Affairs; however, since the decision to expand the Reservation boundary, the City has the greater burden of handling crimes and offenses by tribal members who take full advantage of the commercial and retail services provided in the City, discussed infra.

Strikingly similar to the factual situations in the Rosebud and DeCoteau v. District County Court, 420 U.S. 425 (1975), decisions of this Court, the geographical and demographic character of the Uintah Valley area manifests the long-held non-Indian population's understanding and "justifiable expectation" that the fee lands would be governed by State and local townsite governments. See Rosebud, 430 U.S. at 605; DeCoteau, 420 U.S. 425, 428 (1975). The 85 percent non-Indian majority has populated, developed and governed the entire 400,000-acre disputed portion of the Uintah Valley, whereas the remaining 15 percent Indian population has governed and occupied a tremendously small portion of its extensive land holdings. The distinction between the Trust and non-Trust lands has been apparent and notorious for over 80 years. The non-Indian majority has relied on State and local authority to govern the non-Trust lands by investing their lives and a tremendous amount of public and private funds for quality services and facilities, and in the development of a viable local economy and attractive living environment. The adverse and burdensome consequences of changing time-honored State and local rule over non-Trust Lands, occupied and owned by a non-Indian majority, should be obvious. However, the Court should be aware of the problems existing for this amicus curiae since

the Tenth Circuit's decision to expand the historic Reservation boundary.

## II. Burdensome Consequences Have Been the Practical Impact of the Tenth Circuit's Decision to Expand the Reservation Boundary to Its Historical Extent.

The United States District Court in Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D.C. Utah 1981), expressly acknowledged the "important implications for the allocation of jurisdiction" among the several public authorities in the Uintah Valley. Id., at 1156. However, the Court simply underestimated the seriousness of those implications. The Court stated:

> Far from engendering "absolute chaos and disastrous consequences" this Court's determination of the boundaries of the Uintah and Ouray Indian Reservation should simplify the administration of the law by resolving the nagging disputes that have marked the "jurisdictional history" of that area for years.

Id. at 1156-57. Fortunately, non-Indians and the Ute Tribe have made substantive efforts to cooperate and avoid confrontation as a result of the Tenth Circuit's decision on the issue. See, Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985). However, contrary to the District Court's ivory-tower conclusion, this amicus curiae has experienced and is experiencing troubling and expensive consequences as a result of the non-diminish-



ment boundary decision. Rather than simplify things, it has seriously complicated the administration of the law and created a cumbersome dilemma to businesses and industry in the area.

Roosevelt City is the primary commercial attraction to most of the area's Indian population. Local merchants, for the most part, have appreciated such patronage. However, such patronage and interaction since the boundary change has been the crux of many serious and litigious jurisdictional and law enforcement problems. Roosevelt City's Police Department (RPD) has eight police officers. Since the Tenth Circuit's decision and pursuant to local deputization agreements, the City receives some assistance from Duchesne County, Utah Highway Patrol, and the Bureau of Indian Affairs (BIA). However, RPD estimates that over half of its time is spent on arrests and apprehension incidents involving Indians, and over 80 percent of those are alcohol-related violations. Roosevelt City, for the safety and welfare of its citizens and all persons involved, must necessarily handle and respond to these matters without financial support and, much of the time, without consistent, reliable, and coordinated man-power support from the BIA or the Ute Tribe--whose law enforcement agencies are stationed in Fort Duchesne and concentrate their enforcement efforts only on Trust Land areas.

Extending the jurisdictional boundary over the City has created havoc in Roosevelt City's ability to enforce local and state laws involving Indians. Indians who commit crimes in Roosevelt City are delivered to the BIA and the Ute Tribe for processing. More often than not, however, such perpetrators are not prosecuted or seem to

fall through the cracks. Despite promises to the contrary, the U.S. Attorney's Office for Utah will not prosecute misdemeanors unless serious injury or death is involved.[13] A more serious problem involves those crimes committed by non-tribal or non-federally recognized Indians, more commonly referred to as Mixed-bloods.[14] A growing number of Uintah Mixed-bloods, not generally recognized as having the legal status as "Indians" and not accepted by the Ute Tribe or Federal prosecution systems, are challenging State and municipal jurisdiction over them, thereby creating a very litigious jurisdictional void.

Had the Reservation boundary remained in its diminished state as decided by the Utah Supreme Court in Perank, Roosevelt City would not be grappling with the overwhelming day-to-day quandary and years of expensive criminal and civil litigation of determining whether any one person is an Indian, for jurisdiction purposes. Coupled with the Federal Government's refusal and reluctance to get involved with those who are determined to be Indians, this problem will only magnify, unless the reservation boundary remains diminished. Placing Roosevelt City back within the historical boundaries of the Reservation has resulted in higher enforcement costs and increased man-hours for the City police; greater incidents

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[13] Even though a majority of cases involve minor offenses, serious injury or death cases are still numerous--nearly all being alcohol-related. Furthermore, whereas most incidents involve criminal violations, civil lawsuits brought by Tribal members against non-Tribal members is increasing dramatically.

[14] These people are former Ute Tribe members terminated pursuant to Congressional legislation--now commonly referred to as Uintah Mixed-bloods.



and risks of injury and harm to law enforcement personnel, suspects, and area residents; higher legal costs (both criminal and civil); and the fostering of distrust and racial barriers.

Tribal-member-owned and Indian-owned businesses refusing to comply with City, County and State business licensing and liquor-sales licensing requirements is another serious problem. Those who refuse to comply with local and state laws rely on business licenses issued by the Ute Tribe because the Tribe maintains that Roosevelt City lies within the Reservation boundaries. Such businesses routinely violate State and Federal laws governing the type of liquor sold and the manner in which it is sold, as well as statutorily mandated closing times. Although such violators are required to comply with State and local liquor laws, the Federal Government has the sole authority to enforce such laws.[15] And whereas the Federal Government refuses to enforce State and local laws, the natural consequence is Roosevelt City's lack of meaningful control over such businesses within the City and the overwhelming burden of increased drunk-driving and public intoxication violations, domestic fights, and public disturbances.

With some exceptions and until recently, the Ute Tribe has been relatively careful in asserting its jurisdictional powers over the non-Indian majority in order to assist in keeping the "status-quo" or an even-keel until the boundary issue is finally resolved. There are several exceptions, however, that show disparaging consequences to Roosevelt City.

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[15] See, Rice v. Rehner, 463 U.S. 713 (1983).

One problem is the recently passed Ute Tribe "Contracting Preference Ordinance". Ordinance No. 92-07, Uintah and Ouray Tribal Business Committee (Dec. 1, 1992). This ordinance requires any employer engaged in work or a business within the exterior boundaries of the reservation to give preference in awarding all contracts to Indian-owned businesses (emphasis added). Id. at 4. This ordinance is so broad and over-reaching that it threatens every facet of the local economy--from the largest oil company to the smallest yard-care entrepreneur. Non-compliance can result in very severe fines and penalties, including banning the employer from doing business on the reservation indefinitely. Id. at 9. It is apparent that the Ute Tribe, in an effort to assert its jurisdictional powers to guarantee jobs for its members, is actually creating a disincentive to non-Indian business and industry to invest, develop, and maintain the local economy.

Another similar problem, which is common with numerous Ute Tribal laws, is the Ute Indian Exclusion and Removal Code. Section 3-1-1, et seq., Ute Law and Order Code. This Tribal law provides for the exclusion or removal of persons or entities that the Tribe finds to be threatening or harmful to the Tribe or its members. For example, all persons who either do not own land, have a permanent domicile, or have permanent employment may be excluded or removed from all or any portion of the Reservation." Id. at Section 3-1-2. Therefore, all visitors, part-time workers, and non-landowners could be ousted from the Reservation. Similarly, this law provides for the exclusion or removal of any person "afflicted by a communicable or contagious disease." Id. at Section 3-1-3(6). Roosevelt City is home to the Duchesne County Hospital, which services the entire Uintah Valley area. Under this



strong-arm law, the Tribe could essentially ban people from acquiring medical treatment and prohibit the Hospital from providing essential services.

Another illustration is the disparity in State and Ute Tribe bail schedules for criminal law enforcement. Respective bail amounts for comparable criminal offenses under Utah State and Ute Tribe schedules are as follows: Driving Under the Influence of Alcohol, $1,110.00 versus $75.00; Possession of a Controlled Substance, $200.00 versus $25.00; and Aggravated Assault, $5,000.00 versus $75.00. The Ute Tribe's comparatively low bail amounts alone create a tremendous disparity in area law enforcement and have the net effect of repeated violations by Indians and the added burden on Roosevelt City's law enforcement efforts involving Indians or Tribal citizens.

Tribal members are afforded every possible opportunity to participate (and many do) in State and local functions, such as voting, running for office, jury duty, etc. However, the Ute Tribe does not reciprocate such privileges to non-Tribal members. If this Court decides against diminishment, the non-Indian population faces a political, legal, and constitutional nightmare. Not only does it translate to 15 percent of the population having overall jurisdictional authority over the remaining 85 percent, but also means the majority of the population has no voting rights, representation as to how they are governed, or guaranteed participation in Tribal government. It means another layer of government for non-Indians; and it means no realistic advance of tribal sovereignty or governance because Tribal members and Indians live primarily on Trust Lands. Furthermore, it means Roosevelt City and its residents, as well as the

County and State governing bodies, will continue to supply and fund public and private services and products to the Indian population without adequate compensation and financial support, and face inevitable years of litigation over governing and preemptive powers. It means non-Indian businesses and industry, if they choose to stay in business, must continue to invest and operate in a local economy which they have no representation, worthwhile control, or realistic expectations. Pressure to comply with Tribal laws will result in the reluctance of non-Indians and non-Indian businesses and industry to maintain, develop, and invest in the local economy and infrastructure.

Majority rule, voting rights, and political representation are basic principles of this democratic society. A decision from this Court against the diminishment of the historical Reservation boundary would be contrary to such principles and have a devastating effect on the non-Indians and their non-Trust homelands. A decision in favor of State v. Perank and diminishment would restore over eighty years of State and local autonomy and a greater incentive for business and industry to develop and maintain a viable local economy.

## CONCLUSION

For the foregoing reasons, in addition to those points argued by the State of Utah and local Counties, amicus curiae Roosevelt City requests the Court to uphold the Utah Supreme Court's diminishment decision in State v. Perank, and reverse the U.S. Tenth Circuit's non-diminishment decision in Ute Indian Tribe v. State of Utah.



Respectfully submitted,

Craig M. Bunnell
Craig M. Bunnell, P.C.
Roosevelt City Attorney
**(Counsel of Record)**
190 North Carbon Ave.
Price, Utah 84501
(801) 637-6722

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

# AREAS OF RESPONSIBILITY AND LAND STATUS MAP

# STATE OF UTAH

Scale 1:1,000,000

Polyconic projection
Datum is mean sea level

LEGEND

- County seat
- City, town, or village
- Town boundary shown for towns over 2,500 population

Paved Highways
- Interstate Highway
- Federal or State Highway
- Other Major Highway
- Two Lane Paved

Unpaved Highways
- Improved Gravel (All Weather)
- Graded Dirt
- Ungraded Dirt or 4-Wheel Primitive

Road Symbols
- Interstate
- Federal
- State
- Interchange
- District Boundary
- District Office

- Public Lands
- State Land
- Private Land
- National Forest
- National Parks & Mon
- Military Res. & Wdls.
- Indian Land
- Wildlife Refuge

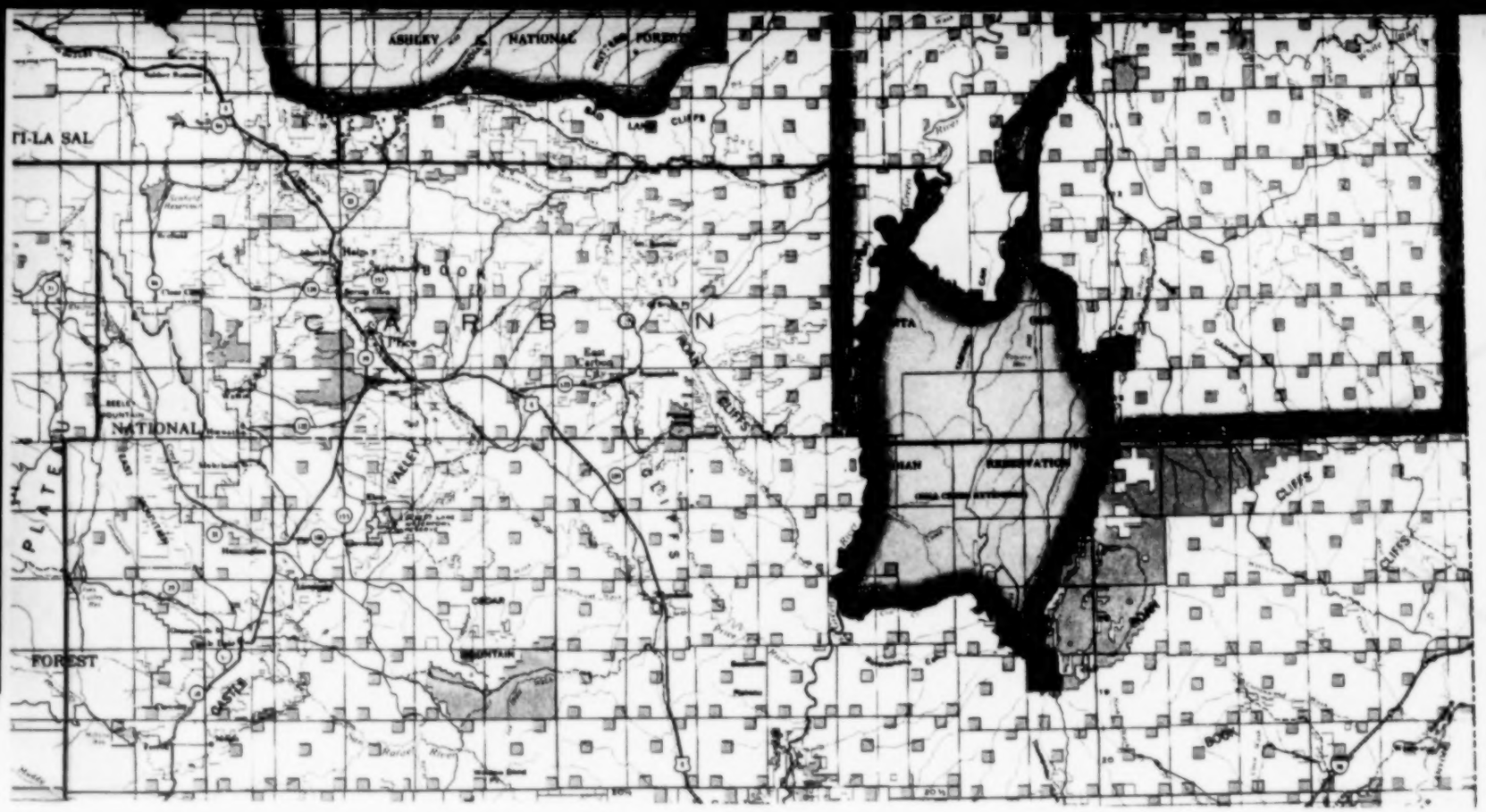
Status as of April 1, 1977

KEY

- ORIGINAL EXTERIOR BOUNDARY UINTAH VALLEY RESERVATION
- ORIGINAL EXTERIOR BOUNDARY UNCOMPAHGRE RESERVATION
- ORIGINAL EXTERIOR BOUNDARY HILL CREEK RESERVATION

W Y O M I N G

S U M M I T
WASATCH NATIONAL FOREST
ASHLEY NATIONAL FOREST
UINTA MOUNTAINS
UINTA
UINTAH AND OURAY
INDIAN RESERVATION
VERNAL DISTRICT
DUCHESNE
ASHLEY
WASATCH


ASHLEY NATIONAL FOREST
TI-LA SAL
C A R B O N
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VALLEY
CLIFFS
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CASTLE
MOUNTAIN
RESERVATION
R A D O

Supreme Court, U.S.
FILED
AUG 18 1993
OFFICE OF THE CLERK

No. 92-6281

In The

# Supreme Court of the United States

October Term, 1993

ROBERT P. HAGEN,

*Petitioner,*

v.

STATE OF UTAH,

*Respondent.*

On Writ Of Certiorari
To The Supreme Court Of The State Of Utah

## BRIEF FOR THE STATES OF SOUTH DAKOTA, ARIZONA, CALIFORNIA, MONTANA, NEVADA AND OKLAHOMA, AS AMICI CURIAE IN SUPPORT OF RESPONDENT STATE OF UTAH

MARK BARNETT
Attorney General

JOHN P. GUHIN*
Deputy Attorney General
500 East Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215

*Attorneys for Respondent*
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Arizona:

The Honorable Grant Woods
Office of Attorney General
1275 West Washington
Phoenix, Arizona 85007

California:

The Honorable Daniel E. Lungren
Office of Attorney General
Department of Justice
1515 K Street, Suite 511
Sacramento, California 95814

Montana:

The Honorable Marc Racicot
Office of Attorney General
Department of Justice
215 North Sanders
Helena, Montana 59620-1401

Nevada:

The Honorable Frankie Sue Del Papa
Office of Attorney General
198 South Carson Street
Carson City, Nevada 89710

Oklahoma:

The Honorable Susan B. Loving
Office of Attorney General
2300 North Lincoln Boulevard
Room 112
Oklahoma City, Oklahoma 73105

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*South Dakota v. Bourland*, 508 U.S. ___, 124 L.Ed.2d 606 (1993).....1, 3

*State v. Flint*, 756 P.2d 324 (Ariz. App. 1988), *cert. denied*, 492 U.S. 911 (1989).....2

*State v. Greenwalt*, 663 P.2d 1178 (Mont. 1983).....2



## TABLE OF AUTHORITIES – Continued

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*State v. Kuntz*, 66 N.W.2d 531 (N.D. 1954).....2

*State v. Larson*, 455 N.W.2d 600 (S.D. 1990).....2

*United States v. Pelican*, 232 U.S. 442 (1914).....7, 12

*Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986)..5, 14

OTHER REFERENCES

*Bureau of Econ. and Bus. Research Report*, University of Utah, Vol. 45, No. 1, p. 8, Table 5, July 1, 1984 (1985).....15

*State v. Perank: Is the Unitah-Ouray Reservation "Nailed Down Upon the Border"*, 1992 B.Y.U.L. Rev. 1247 (1992).....13

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The State of South Dakota, and the other amici states, through their respective Attorneys General, respectfully submit a Brief Amicus Curiae pursuant to Supreme Court Rule 37.2 in support of the Respondent.

## INTEREST OF THE AMICI STATES

The United States has created, within each of the amici states, reservations through treaty, statute or executive order. Many of these reservations have been, in the view of the amici states, diminished or disestablished by subsequent federal action.

The amici states have a vital interest in the proper determination of present reservation boundaries. In the absence of federal legislation similar to P.L. 83-280,[1] the states are generally prohibited from exercising criminal jurisdiction over tribal members within reservation

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[1] The question whether a reservation boundary has been diminished or disestablished will impact even P.L. 83-280 states. 18 U.S.C. § 1151(a) defines "Indian country" in part as:

> all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuances of any patent, and, including rights-of-way running through the reservation.

The limits of a reservation impact many areas of civil law as well, for example, taxation, (*see Oklahoma Tax Comm. v. Sac and Fox Nation*, 508 U.S. ___ (1993)); hunting and fishing, (*South Dakota v. Bourland*, 508 U.S. ___ (1993), and *Montana v. United States*, 450 U.S. 544 (1981)); zoning (*Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); and gaming, Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4)(A).

boundaries; similarly, the courts have frequently found that the states have no jurisdiction over non-Indians committing crimes against tribal members on reservations. *See, e.g., State v. Larson*, 455 N.W.2d 600 (S.D. 1990); *State v. Flint*, 756 P.2d 324 (Ariz. App. 1988), *cert. denied*, 492 U.S. 911 (1989); *State v. Greenwalt*, 663 P.2d 1178 (Mont. 1983); *State v. Kuntz*, 66 N.W.2d 531 (N.D. 1954). Federal law enforcement on reservations, especially with regard to nonfelonious activity, exists only at a low level as demonstrated by testimony repeatedly given through the last decade by the tribes and others.[2] Tribal law enforcement with regard to its own members, is frequently lax

[2] *See, e.g., Jurisdiction on Indian Reservations-Part 2: Hearing Before the Senate Select Committee on Indian Affairs*, 96th Cong., 2d Sess. at 24 (Aug. 11, 1980) (hereinafter *Jurisdiction-Part 2*): "The most common crimes, such as assaults or small burglaries, simply are not prosecuted in the vast majority of instances." (comment of Caleb Shields, Ft. Peck Tribal Executive Board); *Id.* at 56 (comment of Senator Melcher revealing complaints of state judges that federal authorities do not prosecute even major crimes); *Id.* at 32 (comment of local chief of police that only one of ten "felony-type" theft, burglary or assault cases are prosecuted on the reservation); *Id.* at 26 (United States Magistrate's comment on infrequency of prosecution of reservation assaults). Similar testimony was received approximately a decade later. *See, e.g., Investigation and Prosecution of Federal Crimes on Indian Reservations: Hearings Before the Committee on Interior and Insular Affairs*, House of Representatives, 101st Cong., 1st Sess. at 187 (1989): "[O]nly the most aggregious [sic] and clear-cut cases can properly be pursued." (comment of Tribal Chairman Ketachezan); *Id.* at 281: "[W]e see an awful lot of people who probably should be prosecuted for different things just simply slip through because no one is quite sure who is in charge." (comment of Representative Campbell); *see also* H.R. Rep. No. 101-60, 101st Cong., 1st Sess. at 7 (1989).



and politicized. *See generally Duro v. Reina*, 495 U.S. 676, 693 (1990). No tribal law enforcement exists, of course, with regard to non-Indians. Improper resolution of reservation boundary issues unnecessarily restricts the appropriate reach of state law enforcement to the detriment of those Indians and non-Indians on the purported reservations and causes cases frequently to "fall through the cracks."[3]

Furthermore, while the states agree with Petitioner Tribe that tribal authority over non-Indians has been "severely" limited and can be exercised only in "rare situations," Brief of Petitioner at 30, n.14, the tribes nonetheless still retain the ability to and do subject non-Indians on reservations to lengthy legal battles to free themselves from unwanted (and unwarranted) tribal jurisdiction. *See, e.g., South Dakota v. Bourland*, 508 U.S. ___, 124 L.Ed.2d 606 (1993); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Montana v. United States*, 450 U.S. 544 (1981).

[3] Legislators in both the 1980 and 1989 hearings drew attention to the fact that reservation law enforcement let cases "fall through the cracks." *See Jurisdiction-Part 2, supra* at 21 (comment of Senator Melcher); *Investigations and Prosecution of Federal Crimes on Indian Reservations: Oversight Hearings Before the Committee on Interior and Insular Affairs*, 100th Cong., 2d Sess. 249 (1988); *Prosecution of Federal Crimes, supra* at 249: "Case-by-case determination can lead to a cumbersome, inefficient process which ultimately leads to cases falling through the cracks." (Comment of Representative Tim Johnson.)

## SUMMARY OF ARGUMENT

In *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), this Court set out a "fairly clean analytical structure" for determining when a surplus land act had disestablished a reservation boundary. The determination of whether a reservation boundary has been diminished is a matter of discerning congressional intent, and "[t]he most probative evidence of congressional intent is the statutory language." *Id.* Thus, the Court looks to the language of the congressional enactment to find "[e]xplicit reference to cession or *other language* evidencing the present and total surrender of all tribal interests. . . . " *Id.* (Emphasis added.) As *Solem* itself indicates, through reference to *Seymour v. Superintendent*, 368 U.S. 351, 355 (1962), as cited at *Solem*, 465 U.S. at 470, language of an act which affirmatively returns land to the "public domain" is such "other language," which evidences a "total surrender of all tribal interests" and thus operates to disestablish the reservation. "Cession" language may also be important and when such "cession" language is "buttressed by an unconditional commitment from Congress to compensate the Indian Tribe for its opened land, there is an almost insurmountable presumption that Congress meant" that the Tribe's reservation was thus diminished. *Solem*, 465 U.S. at 470-471.

Even absent language that diminishes the reservation by returning the subject land to the "public domain," and even in the absence of "cession" language combined with an unconditional commitment to compensate the Tribe, the Court will look to the contemporaneous understanding of the act. *Solem*, 465 U.S. at 471. Finally, the Court will look to the actual settlement of the reservation to



determine what Congress "expected would happen once" the land was opened to non-Indians. 465 U.S. at 472. The Court also has indicated that "de facto, if not de jure" diminishment may occur absent any other factor when an area "has long since lost its Indian character." 465 U.S. at 471.

Petitioner and his supporting amici analysis badly slight several of the critical components of this Court's tests. First, United States and Tribe ignore almost entirely this Court's consistent finding, set out in detail below, that when Congress affirmatively, in "operative language," restores particular land to the "public domain," the reservation is pro tanto diminished. Second, Petitioner implies the almost absolute necessity of "language of cession" in an agreement with a Tribe combined with an unconditional commitment from Congress to compensate the Tribe for its open land so as to constitute disestablishment. What Petitioner thus ignores is that a "cession" of lands by a Tribe is merely one way that allows them to be returned "to the public domain"; in other words, the "cession" is merely a means to transfer the lands to the public domain. Consistent with decisions of this Court since 1914, when lands are restored to the public domain either directly by an explicit restoration "to the public domain," or indirectly through "cession" language, the reservation is diminished. Petitioner confuses *method* with *result*.

Further, we suggest that Petitioner and the Tenth Circuit Court of Appeals in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985)(en banc), *cert. denied*, 479 U.S. 994 (1986) badly misread the contemporaneous understanding of the transactions between the Tribe and United

States, and, moreover, have ignored the demographics of the area contrary to *Solem v. Bartlett*, 465 U.S. at 471-472 and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977).

In the case now before the Court, the critical act provides that after certain allotments are made "the unallotted lands within said reservation shall be restored to the public domain." Act of May 27, 1902, 32 Stat. 245, 263-264 (1902). Congress, in the "operative language," restored the subject lands to the public domain, and thus, in line with the well-established precedent disestablished the reservation boundaries. Furthermore, the demographics of the former reservation indicate a long-standing overwhelming majority of non-Indians, and provide both additional evidence of congressional intent to disestablish and of de facto disestablishment.

## ARGUMENT

### I

### CONGRESS INEVITABLY INTENDED DIMINISHMENT OF A RESERVATION WHEN IT AFFIRMATIVELY RESTORED LAND TO THE "PUBLIC DOMAIN."

This Court has stated that:

> The most probative evidence of congressional intent is the statutory language used to open the Indian lands.

*Solem v. Bartlett*, 465 U.S. 463, 470 (1984).



The rule giving primacy to the text of a congressional statute is, of course, unassailable and is one which promotes the rule of law. A search of the statutory language which has, in the past, been used "to open the Indian lands" indicates invariably that when Congress has explicitly, in the "operative language" of a statute, "restored lands to the public domain" it has been found to have divested reservation status from the lands.

This Court's adoption of this principle dates at least to 1914, at a time period roughly contemporaneous with the Surplus Lands Acts themselves. In *United States v. Pelican*, 232 U.S. 442 (1914), the Court considered the Act of July 1, 1892, which specified that a portion of a reservation was "vacated and restored to the public domain." This Act, said the Court, was "legislation by which the reservation was diminished." 232 U.S. at 445. The 1914 finding of the Court with regard to language which restored areas "to the public domain" is especially valuable, given its proximity in time with the legislation itself. *Pelican* is itself consistent with an even earlier circuit court decision, *McFadden v. Mountain View Min. & Mill. Co.*, 97 F.R. 670 (9th Cir. 1899).

The second opportunity for this Court to examine this question came in *Sioux Tribe v. United States*, 316 U.S. 317 (1942). In *Sioux Tribe*, the Court considered various executive orders which indicated that particular land was "'restored to the public domain.'" 316 U.S. at 323. In each of these cases, restoration to the public domain was equated with the termination of any special status.

In *Seymour v. Superintendent*, 368 U.S. 351, 354 (1962), the Court reaffirmed the concept that a reservation was

diminished when the lands were "vacated and restored to the public domain. . . . " The Court stated that:

> In 1892, the size of this reservation was diminished when Congress passed an Act that, subject to reservations and allotments made to individual Colville Indians, about one-half of the original Colville reservation, since commonly referred to as the 'North Half,' should be 'vacated and restored to the public domain. . . . ' (Footnote omitted.)

Unlike legislation relating to the North Half, the later legislation relating to the South Half contained no "restore to the public domain" language and the Court thus refused to find disestablishment of the South Half.

*Mattz v. Arnett*, 412 U.S. 481 (1973) traced the progress of certain surplus land legislation which had *originally* provided that the lands "be restored to the public domain." 412 U.S. at 502. The bill containing that language, however, was defeated in the Senate, *see* 412 U.S. at 502, and legislation ultimately passed *without* such language. The Court was to hold that no disestablishment was effected.[4]

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Court considered the disestablishment of the Sisseton Reservation in South Dakota. Although the statute at issue did not explicitly restore the lands "to the

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[4] The Mattz Court did, however, refer to language which affirmatively "vacated and restored to the public domain" the Colville lands as "clear language of express termination. . . . " *Mattz*, 412 U.S. at 504, n.22.



public domain," the effect of the Act was to accomplish just that. As the Court said:

> This language [i.e., the Sisseton Agreement language] is virtually indistinguishable from that used in the other sum-certain, cession agreements ratified by Congress in the same 1891 Act. See nn.21 and 22, supra. *That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much.* The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the "public domain."

*DeCoteau*, 420 U.S. at 446. The critical point in *DeCoteau* is that the *effect* of the Act was to "restore lands to the public domain" and that this "restoration to the public domain" constituted the disestablishment of the reservation.

In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), this Court considered again congressional language restoring land "to the public domain." The Court drew attention to the creation of the Great Sioux Reservation which constituted twenty-five million acres. *Rosebud*, 430 U.S. 589. The Court found that in 1877, the Black Hills portion of the reservation was removed from the reservation. In 1889, according to the court:

> approximately one-half of the remaining reservation was 'restored to the public domain' under the Act of March 2, 1889, 25 Stat. 896, § 21, while six separate Reservations were carved out of the remainder. (Footnote omitted.) §§ 1-6.

*Rosebud*, 420 U.S. at 519.

The Court thus equated the affirmative restoration to the "public domain" of the remaining one-half of the Great Sioux Reservation with disestablishment of that portion of the reservation.

Although the diminishments of Mellette, Tripp and Gregory Counties at issue in *Rosebud* did not contain the "public domain" language, other indicia of disestablishment allowed the six-member majority to find disestablishment. Three Justices dissented but nonetheless positively endorsed the principle that restoration to the "public domain" language was "clear language of express termination." 430 U.S. at 618 (Marshall, J., dissenting). The dissenters likewise added their specific agreement that when Congress "expressly 'restored to the public domain' " part of the Great Sioux Reservation, that part of the Reservation was disestablished. *Id.*

*Solem v. Bartlett, supra,* again affirms the concept that return of land to the public domain constitutes disestablishment of reservation boundaries. In *Solem*, 465 U.S. at 470, the Court began by explicitly noting that:

> The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or *other language evidencing the present and total surrender of all tribal interests strongly suggest that Congress meant to divest from the reservation all unallotted opened lands. DeCoteau, the District County Court, supra* at 444-445; *Seymour v. Superintendent, supra* at 355. (Emphasis added.)

The cases cited in this passage are *DeCoteau* and *Seymour v. Superintendent*. In *DeCoteau*, the language cited was "cession" language coupled with an unconditional



commitment to compensate. *Seymour v. Superintendent*, as cited by *Solem*, contrasts language which "vacated and restored [certain lands] to the public domain" and thus diminished the reservation, *Seymour*, 368 U.S. at 355, with language of a second act which, among other things, did *not* "return land to the public domain," *id.*, and did not diminish the reservation. The citation of this particular passage in *Seymour* by the *Solem* Court indicates the *Solem* Court's adherence to the long line of cases indicating that restoration to the public domain does, in fact, constitute termination of reservation status for the lands involved. It also indicates, not surprisingly, the adherence of Justice Marshall, the author of *Solem v. Bartlett*, with his earlier dissent, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 618, that restoration to the "public domain" language was "clear language of express termination." The argument has been made that *Solem* altered this long-standing rule regarding disestablishment by virtue of return of land to the public domain. In *Solem*, however, Congress did *not* affirmatively restore lands to the public domain. Instead, Congress merely provided that the secretary should "sell and dispose" of certain lands. 465 U.S. at 473. There is no affirmative restoration of lands to the public domain by Congress in the *Solem* Act. It is, of course, true that one section of the Act referred to certain areas of the reservation as being in "the public domain." *See Solem*, 465 U.S. at 475. The Court in *Solem*, 465 U.S. at 472, 474, however, directs its focus to the "operative language" of the Act, or the language through which Congress affirmatively acted. There is nowhere within the "operative language" of the Cheyenne River Act an affirmative restoration of Indian lands to the "public domain." The lack of

"operative language" restoring the lands to "the pubic domain" distinguishes *Solem* from the earlier cases.[5]

Thus, this Court has consistently held that when a statute in its "operative language" restores lands to the public domain, those lands are disestablished or removed from the reservation. That is precisely the case here. The Act of May 27, 1902, 32 Stat. 245, 263-264, provides that after allotments are made "the unallotted lands within said reservation *shall be restored to the public domain*. . . . " In line with the cases from *Pelican* to *Solem*, this affirmative restoration of lands to the public domain amounts to a congressional determination that the reservation is disestablished.

## II

## CONTEMPORANEOUS CIRCUMSTANCES DEMONSTRATE A CLEAR TRIBAL AND CONGRESSIONAL UNDERSTANDING THAT THE ACT WOULD CONSTITUTE DISESTABLISHMENT.

The State of Utah has ably demonstrated that contemporaneous circumstances indicate a clear tribal and

---

[5] The *Solem* Court also stated that "even without diminishment, unallotted opened lands could be conceived of as being in 'the public domain' inasmuch as they were available through settlement." 465 U.S. at 475 n.17. The Court does not, however, undermine its earlier holdings that language affirmatively restoring lands to the public domain disestablishes the reservation, but refers here only to one potential concept of the nature of "public domain." A contrary conclusion, i.e., one which eviscerates the significance of "public domain" language when used to describe affirmative action by Congress, would reduce the several cases cited above to irrelevancy, a result the Court did not, presumably, intend.



congressional understanding that the legislation in issue would disestablish the reservation. The most critical part of the negotiations was Commissioner McLaughlin's talk with tribal members which explained, in as clear terms as possible, that the boundary to the reservation was being eliminated whether the tribal members desired such elimination or not. McLaughlin stated in his negotiations with the Tribe:

> You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will *pull up the nails* which hold down that line and *after next year there will be no outside boundary line to this* reservation. . . . The question of opening the reservation is not with you; that has been determined by the act of congress. . . .

JX 162, pp. 42-45 (emphasis added). *See State v. Perank: Is the Unitah-Ouray Reservation "Nailed Down Upon the Border"*, 1992 B.Y.U.L. Rev. 1247 (1992). The United States now attempts to repudiate the statement of its negotiator with the Tribes. *See Brief for the United States as Amicus Curiae Supporting Petitioner* at 23 and n.31. Although McLaughlin clearly informed the tribal members that the reason that Congress could take such action was a recent Supreme Court decision, the tribal members are presumed not to know or believe this statement apparently because the decision was "only four months" old. *Id.* In fact, matters proceeded precisely as McLaughlin told the Tribes they would proceed: Congress "pulled up the nails" of the reservation and provided that there would

be "no outside boundary line"; it also imposed a mandatory allotment scheme. JX 162, pp. 42-45. (A more extensive excerpt from this dialogue is set forth as Appendix "C" to Utah's Brief.) The federal position that a true statement to the Tribe by a federal negotiator should be ignored is anomalous, to say the least.[6]

## III

## THE JUSTIFIABLE EXPECTATIONS OF THE PARTIES ARE THAT THE RESERVATION BOUNDARIES HAVE BEEN DIMINISHED.

*Rosebud*, 430 U.S. at 604-605 and *Solem*, 465 U.S. at 471-472, grant substantial deference to the justifiable expectations of the parties with regard to the existence or nonexistence of reservation boundaries. Close consideration of the cases indicates that such deference is expressed in two ways. First, according to *Solem*, 465 U.S. at 471-472, a court will:

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[6] It is striking that neither the United States nor the tribe now contests the removal of the Gilsonite Strip from this very reservation by the Act of May 24, 1888, 25 Stat. 157. This statute provided that the lands were to be "restored to the public domain," after a favorable tribal vote. Moreover, the accompanying House Report, H.R. Rep. No. 791, 50th Cong., 1st Sess. at 3 (1888), reinforces the view that Congress intended to terminate reservation status when it returned reservation lands to the public domain, stating: "[T]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof *to the public domain* as the exigencies of advancing population required it. . . . " (Emphasis added.) *See Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1108 (10th Cir. 1985)(Seth, J., dissenting)(*cert. denied*) 479 U.S. 994 (1986).



> look to the subsequent demographic history of the opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers. (Footnote omitted.)

Second, and more dramatically, the influx of non-Indians into an area may well signal acquiescence of the parties in diminishment and, consistent with the law of state boundary disputes, de facto diminishment might be found. *Solem*, 465 U.S. at 471. *See also Louisiana v. Mississippi*, 202 U.S. 1, 53-54 (1906)("[T]his court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive. . . . "); *Rhode Island v. Massachusetts*, 45 U.S. 591, 639 (1846) ("for the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary").

In the case now before the Court, the demographic information constitutes strong and compelling evidence of congressional intent to disestablish and, in addition, is of such a quality as to support a finding of de jure or de facto disestablishment.

The most important demographic fact is that the area is overwhelmingly populated by non-Indians. At least 18,000 non-Indians live within the historic reservation boundaries. (J.A. 130-131) (Seth, J., dissenting). Only 1,500 enrolled members of the Tribe live within the former boundaries. Pet. App. 38A.; *Bureau of Econ. and Bus.*

*Research Report*, University of Utah, Vol. 45, No. 1, p. 8, Table 5, July 1, 1984 (1985).

Further, of those 1,500 members, only about 300 live on the actual nontrust lands at issue before this Court. J.A. 131. Thus, using the figures most generously to the Tribe, approximately 92% of the persons within the historic boundaries are non-Indian. Utilizing the number of Native Americans who reside upon the land actually at issue in this case, the statistics become even more overwhelming. Of the approximately 18,000 persons who live on the nontrust areas, over 98% are non-Indian; only about 300 Native Americans live in the nontrust areas, as noted above.

Similarly, patterns within the historic reservation boundaries at issue parallel population configurations. Virtually all the land in question consists of private, state, Bureau of Land Management or federal Forest Service property. *See* Map, J.A. 185.

In short, relying upon the restoration of the now disputed lands to the public domain, thousands of non-Indians entered the area and now overwhelmingly populate and own the area. Their justifiable expectations are to live pursuant to the rules and regulations of a government in which they can participate, and to have access to a responsive law and order system which is able to deal with offenses of all persons within the community. They also necessarily expected to be free from the incessant disputes which face non-Indians with regard to civil regulatory issues.



## CONCLUSION

The most important single factor in determining whether reservation boundaries have been diminished is the language of the statute. In the case now before this Court, Congress affirmatively, in the "operative language" of the statute, restored the land in question "to the public domain." Such affirmative restoration of lands to the public domain, without exception, has been held to constitute disestablishment of reservation boundaries. This interpretation is further supported by the contemporaneous understanding of the statute and in particular by the clear and unequivocal statement of the negotiator for the United States to the Tribe. Finally, the overwhelming number of non-Indians who have entered the area subsequent to the restoration of the land to the public domain indicate a settled expectation which should not, under this Court's precedents, be now disturbed.

The decision of the Utah Supreme Court should be affirmed.

Respectfully submitted,

MARK BARNETT
Attorney General
State of South Dakota
500 E. Capitol
Pierre, SD 57501-5070
(605) 773-3215

JOHN P. GUHIN*
Deputy Attorney General
500 E. Capitol
Pierre, SD 57501-5070
(605) 773-3215

*Counsel of Record

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No. 92-6281

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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ROBERT P. HAGEN,
*Petitioner,*
v.
STATE OF UTAH,
*Respondent.*

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**On Writ of Certiorari to the Supreme Court of Utah**

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## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

---

CHARLES ROTHFELD
ALAN UNTEREINER
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol St., N.W.
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

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Pursuant to Rule 37.4 of the Rules of this Court, *amici* respectfully move this Court for leave to file the attached brief *amici curiae* in support of respondent. Respondent has consented to the filing of this brief. This motion is made necessary by the failure of petitioner to consent to the filing.

The *amici* are organizations whose members include State, county, and municipal governments and officials throughout the United States. *Amici* have a compelling and continuing interest in the issue presented in this case:

when does an Act of Congress diminish the boundaries of an Indian reservation?

Determining the precise boundaries of Indian reservations situated within the States of *amici*'s members is a matter of considerable importance. Land within the boundaries of an Indian reservation is "Indian country" as defined in 18 U.S.C. § 1151. Crimes committed by Indians in "Indian country" are in most cases not within the jurisdiction of State courts, but rather are subject to federal and tribal jurisdiction. See 18 U.S.C. §§ 1152, 1153, 1162. In addition, the civil jurisdiction and regulatory powers of the States hinge in part on the reservation status of lands. See generally *Oklahoma Tax Comm'n v. Sac and Fox Nation,* 113 S. Ct. 1985 (1993). Ambiguity in reservation boundaries thus creates jurisdictional uncertainty and gives rise to disputes between state, tribal, and federal authorities. Moreover, where, as here, "an area is predominantly populated by non-Indians, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Solem v. Bartlett,* 465 U.S. 463, 471 n.12 (1984).

Because *amici* have a compelling interest in the rules governing their territorial jurisdiction, they seek leave to file this brief to assist the Court in the resolution of this case.

Respectfully submitted,

CHARLES ROTHFELD
ALAN UNTEREINER
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol St., N.W.
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record*
*for the* Amici Curiae

## QUESTION PRESENTED

Whether the Act of May 27, 1902, ch. 888, 32 Stat. 245, as amended, which directed that certain unallotted lands in the Uintah Indian Reservation in Utah "shall be restored to the public domain," diminished the size of that reservation.

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## INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.

## STATEMENT

This case arises out of petitioner Robert Hagen's felony conviction, on a plea of guilty in Utah court, for distributing illegal drugs in Myton, Utah. Petitioner contends that Myton is located within the boundaries of an Indian reservation, that the Utah courts therefore lacked

jurisdiction over him, and that his conviction accordingly is invalid. The Utah Supreme Court rejected petitioner's argument and upheld his conviction, reasoning that Myton, which is situated in an area that Congress ordered "restored to the public domain" (Act of May 27, 1902, ch. 888, 32 Stat. 245), is no longer a part of the present-day Uintah and Ouray Indian Reservation ("Uintah Reservation").

**A. History of the Uintah Reservation.**

The Uintah Reservation is located in northeastern Utah and inhabited by the Ute Indians, a federally recognized tribe consisting of the White River, Uintah and Uncompahgre Bands. On October 3, 1861, President Lincoln signed an executive order creating the original Uintah Valley Indian Reservation. Executive Order 38-1, *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 900 (1904). President Lincoln's order set aside approximately two million acres, mostly within what is now Duchesne County.[1] In 1864, Congress confirmed the establishment of the reservation. Act of May 5, 1864, ch. 77, 13 Stat. 63.

Beginning in 1887, and continuing until 1934 when the policy was abandoned, Congress sought to encourage the "eventual assimilation of the Indian population" and "the general extinction of Indian reservations and Indian titles" (*Montana v. United States,* 450 U.S. 544, 559 n.9 (1981) (internal quotations omitted)), in a "comprehensive attempt to create a new role for the Indian in American Society." Felix S. Cohen, *Handbook of Federal Indian Law* 130 (1982). To carry out this policy, Congress passed a series of "surplus land" or "allotment" Acts, which allotted to individual tribal members Indian reservation lands previously owned in common by tribes. The remaining, unallotted reservation lands were made available for purchase and settlement by non-Indians.

[1] Today roughly 1.1 million acres of the original reservation are tribally owned "trust lands," on which nearly all of the approximately 3000 enrolled members of the Ute tribe reside. J.A. 28-29 & n.10; Br. Resp. 10 n.9. It is agreed by the parties that these lands remain part of the Uintah Reservation. Accordingly, this case concerns diminishment—rather than disestablishment—of an Indian reservation. On the significance of the distinction, see *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 598 n.20 (1977).



A major aim of Congress's allotment policy was to encourage individual Indians to become yeoman farmers and thereby to integrate them into the economy of the time. See *Solem v. Bartlett,* 465 U.S. 463, 466 (1984); *Ute Indian Tribe v. Utah,* 521 F. Supp. 1072, 1086 n.38 (D. Utah 1981); J.A. 29-30. The Uintah Valley Reservation was not excepted from this national policy of encouraging assimilation through allotment; Congress passed a series of Acts allotting or proposing to allot lands within the boundaries of the original reservation.

The first such Act relating to the Uintah Reservation was passed in 1888. This statute, whose stated purpose was "to restore to the public domain a part of the Uintah Valley Indian Reservation," opened a small area of the reservation to mining claims. Act of May 24, 1888, ch. 310, 25 Stat. 157. The opened area, known as the "Gilsonite Strip" after a mineral found there, was "declared to be public lands of the United States and restored to the public domain." *Ibid.* The Act required three-fourths of the adult male Indians on the reservation to consent before the "restoration shall take effect," which they did, and further provided that the proceeds of the sale of the land were to be deposited in the United States Treasury and credited to the Utes. *Ibid.* The parties to this case do not dispute that the 1888 Act altered the reservation boundaries by removing the Gilsonite Strip. See J.A. 43; *Ute Indian Tribe,* 521 F. Supp. at 1099.

In 1894 and again in 1898 Congress attempted to allot agricultural lands on the Uintah Reservation to members

of the Ute Tribe. The Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, directed the President to appoint a three-person commission to negotiate the Indians' acceptance of the proposed allotments. The statute instructed the commissioners to obtain "the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians * * *." *Ibid.* Because of delays occasioned by the 1894 commission's negotiations with the nearby Uncompahgre Band (see S. Doc. No. 32, 55th Cong., 1st Sess. 2-3 (1897)), Congress authorized the creation of a new commission in 1898. Act of June 4, 1898, ch. 376, 30 Stat. 429. A stated purpose of the 1898 Act was "to obtain the cession to the United States of all lands within [the Uintah Indian Reservation] not * * * allotted." *Ibid.* Similarly, the new commission was explicitly directed to seek the Utes' agreement to "the cession to the United States" of all unallotted lands within the reservation. *Ibid.* Although the 1898 Act called for the consent of only a majority of the adult male Utes, rather than the three-quarters required under the 1894 Act, the commission was unable to gain the Indians' approval.

On May 27, 1902, Congress enacted the legislation that is principally at issue in this case. Act of May 27, 1902, ch. 888, 32 Stat. 245. The 1902 Act again provided for the allotment of Uintah Reservation lands with the consent of a majority of adult male Utes. The Act required that allotments be made by October 1, 1903. And, in words virtually identical to those of the 1888 Act diminishing the reservation by removing the Gilsonite Strip, the Act mandated that after October 1, 1903, all unallotted lands "shall be restored to the public domain." *Ibid.* Unallotted lands "so restored to the public domain" were then to be sold for a fixed sum of $1.25 per acre, with the proceeds used first to reimburse the United States for monies advanced to the Indians and second "for the benefit of [the] Indians," as directed by the Secretary of the Interior. *Ibid.* Among other things, the Act also appropriated $70,064.48 "to be paid to the Uintah and the White River tribes of Ute Indians" when a majority of the adult males consented to both "the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided." *Ibid.*[2]



Congress did not fund the surveying needed to implement the 1902 Act until March 1903. Indian Appropriations Act of Mar. 3, 1903, ch. 994, 32 Stat. 982, 997-998. See *Ute Indian Tribe*, 521 F. Supp. at 1116. Because of this delay, the 1903 Act pushed back by a full year the 1902 Act's deadline, to October 1, 1904.

Congress passed the 1903 Act only two months after this Court's landmark ruling in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). *Lone Wolf* held that Congress possesses plenary power over reservation lands, and thus may unilaterally alter reservation boundaries without tribal consent. In the 1903 Act, Congress accordingly for the first time did not require that the Utes assent to the allotment of reservation lands. Indeed, the 1903 Act specifically instructed the Department of the Interior to

> send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, *then the Secretary of the Interior shall cause to be allotted* to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act * * *.

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[2] One month after passing the 1902 Act, Congress amended it by Joint Resolution. J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902). The Joint Resolution directed that the $70,064.48 appropriated for payment to the Utes be paid out "without awaiting their action upon the proposed allotment * * * and the restoration of the surplus lands to the public domain." *Ibid.*

32 Stat. 982, 997 (emphasis added). In 1904, responding to further delays in surveying and other administrative tasks necessary for allotment of the Uintah Reservation, Congress again extended the deadline for implementation of the 1902 Act, this time to March 10, 1905. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-08.

Additional delays required one more extension of the 1902 Act's deadline. In 1905, Congress set a deadline of September 1, 1905, but granted the President authority to set an earlier date if he deemed the allotment work complete before then. Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70. In response to concerns that speculators would buy up the unallotted lands, the 1905 Act also provided that, for the first five years after the lands were restored to the public domain, settlement would be permitted only under the terms of the homestead and town-site laws:

> [T]he said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the [1902 Act], shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof * * *.

*Ibid.* After five years, these restrictions on the "manner" of settlement would lapse and all unallotted lands that had not been disposed of would "be sold and disposed of for cash," with "[t]he proceeds" to be "applied as provided" in the 1902 Act. *Ibid.*

On July 14, 1905, President Roosevelt issued a proclamation opening the unallotted lands to settlement as of August 28, 1905:

> Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat., 263),



> among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, 'shall be restored to the public domain * * *.'
>
> And, whereas, the time for the opening of said unallotted lands was extended * * * by the Act of Congress approved Mar. 3, 1903 * * * and * * * by the Act of Congress approved Apr. 21, 1904 * * * and * * * by the Act of Congress, approved Mar. 3, 1905 * * *.
>
> Now therefore I, Theodore Roosevelt, * * * hereby declare and make known that all unallotted lands in said reservation [with certain exceptions] * * * will on and after the 28th day of Aug., 1905, in the manner hereinafter prescribed * * * be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States * * *.

Presidential Proclamation of July 14, 1905, 34 Stat. 3119.

**B. Proceedings Below.**

On August 28, 1989, petitioner pleaded guilty in the Eighth District Court of Duchesne County, Utah, to distribution of marijuana. J.A. 2, 15. Before sentencing, petitioner sought to withdraw his guilty plea, arguing that the state court lacked jurisdiction because he is a member of the Little Shell Band of Chippewa Indians of Montana and because the Town of Myton, where he committed the offense, lies within the boundaries of the Uintah Reservation. J.A. 15; Pet. App. I, at 2.[3] The trial court denied the motion, finding that petitioner is not an Indian. Pet. App. I, at 4-5. The Utah Court of Appeals reversed,

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[3] Under 18 U.S.C. § 1151(a) "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government * * *." State jurisdiction in Indian country is generally limited to crimes by non-Indians against non-Indians, and victimless crimes by non-Indians. See *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984).

holding that (1) the State had failed to carry its burden of showing that petitioner is not an Indian, and (2) Myton is situated within the Uintah Reservation as its boundaries were defined by the Tenth Circuit in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). *State v. Hagen*, 802 P.2d 745 (Utah Ct. App. 1990).

The Utah Supreme Court reversed in turn and reinstated petitioner's conviction. J.A. 15-16. Explaining that Myton is not located on the Uintah Reservation because the "1902 and 1905 congressional acts diminished the original * * * Reservation boundaries," the Utah Supreme Court referred to and adopted as the basis for its decision the reasoning set forth in a companion case decided the same day, *State v. Perank*, 191 Utah Adv. Rep. 5 (Utah July 17, 1992). J.A. 16.

In *Perank*, the Utah Supreme Court offered a detailed analysis of congressional and presidential actions affecting the Uintah Reservation. See J.A. 18-87. Canvassing the pertinent case law, the Court explained, first, that the operative language of the 1902 Act, which directed that unallotted lands were to be "restored to the public domain," clearly effected a diminishment of the Uintah Reservation. J.A. 29-41. In so holding, the Utah Supreme Court declined to follow the Tenth Circuit's contrary decision in *Ute Indian Tribe*. J.A. 37; see also J.A. 34-41. Second, the Court explained that the 1902 Act's operative language remained in effect in 1905, when the unallotted lands were opened pursuant to President Roosevelt's Executive Order, because "the 1905 Act was merely amendatory and supplementary to the 1902 Act" and therefore "did not repeal the 1902 Act's restoration language." J.A. 42. In reaching that conclusion, the Utah Supreme Court relied on an extensive review of "the pertinent statutes, legislative history, and contemporaneous and subsequent congressional, executive, and judicial constructions of the 1902 and 1905 Acts," all of which showed, the Court concluded, "that the 1902 Act



was considered the basic statute dealing with the opening of the Reservation." J.A. 42. See also J.A. 44-73.

## SUMMARY OF ARGUMENT

Land set aside by Congress for an Indian reservation retains its reservation status until Congress evinces a clear intent to change the reservation boundaries. That principle does not, however, dictate use of any particular test in determining congressional intent; to the contrary, the Court has expressly eschewed use of a rigid or mechanical approach in determining Congress's purpose in this setting. Congress may, of course, diminish a reservation by using express statutory language to that effect. And when the statutory language is ambiguous, the Court will consider all of the usual indicia of legislative intent—and some that are most unusual, such as post-enactment demographic changes on the land in question.

In this case, the plain language of the 1902 Act diminished the Uintah Reservation. The Act provides that unallotted lands "shall be restored to the public domain." In every one of this Court's decisions concerning diminishment of Indian reservations, that phrase has been understood to deprive the land in question of reservation status. The 1903, 1904, and 1905 Appropriations Acts concerning the Uintah Reservation did not reflect a change in Congress's baseline purpose. The later statutes were not independent of the 1902 Act; to the contrary, they extended the initial Act's deadline and were expressly intended to carry out its purposes. None of them displaced the operative language of the 1902 Act, which restored the unallotted portion of the Uintah Reservation to the public domain and thus removed it from the reservation.

## ARGUMENT

### I. IN ASSESSING CONGRESS'S INTENT BEHIND A PARTICULAR SURPLUS LAND ACT, THIS COURT CONSISTENTLY HAS EXAMINED ALL RELEVANT FACTORS BEARING ON THAT ISSUE.

It is common ground between the parties and the United States that Congress possesses "plenary authority to legislate for the Indian tribes in all matters, including their form of government." *United States v. Wheeler,* 435 U.S. 313, 319 (1978). It is thus clear, as this Court held in *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903), that Congress may "diminish reservations unilaterally." *Solem v. Bartlett,* 465 U.S. 463, 470 n.11 (1984). The parties and the United States also agree that whether Congress has diminished a reservation is a question of congressional intent. See *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 586, 588 n.4 (1977).

Over the past thirty years, this Court has considered that intent in the context of surplus land Acts on five occasions. *Solem*; *Rosebud*; *DeCoteau v. District County Court,* 420 U.S. 425 (1975); *Mattz v. Arnett,* 412 U.S. 481 (1973); *Seymour v. Superintendent,* 368 U.S. 351 (1962). As the Court explained most recently in *Solem,* these cases have established "a fairly clean analytical structure" for determining whether a particular surplus land Act altered a reservation's boundaries or instead merely granted non-Indians the right to purchase lands within the reservation. 465 U.S. at 470. Under this Court's well-established approach, land set aside by Congress for an Indian reservation "retains its reservation status" until Congress "clearly evince[s] an 'intent . . . to change . . . boundaries.'" *Solem,* 465 U.S. at 470 (quoting *Rosebud,* 430 U.S. at 615).

In deciding whether there is clear evidence that Congress intended to diminish reservation boundaries, this



Court examines several factors. Not surprisingly, the first factor is the language and structure of the Act itself. "The *most* probative evidence of congressional intent," of course, "is the statutory language *used to open* the Indian lands." *Solem,* 465 U.S. at 470 (emphasis added). If the operative language of the statute contains either an "[e]xplicit reference to cession," or "other language evidencing the present and total surrender of all tribal interests," then this "strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Ibid.* Such express operative language, however, is not required for diminishment. *Id.* at 471. See also *Rosebud,* 430 U.S. at 588 n.4 (rejecting "notion that * * * express language in an Act is the *only* method by which congressional action may result in disestablishment") (emphasis in original). In addition to the statute's operative language, other language in the Act, as well as the Act's structure, may provide evidence of congressional intent. See *Solem,* 465 U.S. at 472-73.

A second factor examined by this Court involves the "events surrounding the passage of [the] surplus land Act." *Solem,* 465 U.S. at 471. These include not only the historical events leading up to passage, but also the genesis of the legislation as well as all of the usual legislative materials. *Id.* at 471, 476-78. A third factor, relied on by this Court to a "lesser extent," consists of the "events that occurred after * * * passage," including the "subsequent treatment" of the area in question "by Congress, courts, and the Executive." *Id.* at 471, 478. Finally, this Court has looked to subsequent demographic changes on the land in question, out of a pragmatic recognition "that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation." *Id.* at 471, 479-80.

In assessing Congress's intent behind a particular surplus land Act, this Court has eschewed a mechanistic approach to these factors. In *Rosebud,* for example, the Court declined to "seize[] upon" particular factors as

"absolutes," opting instead for a more flexible inquiry in which all relevant evidence of intent is examined and given its due weight. See 430 U.S. at 588 n.4. Nevertheless, the Solicitor General, and to a lesser extent petitioner, now urge the Court to adopt a rigid formula for deciding reservation diminishment cases. See U.S. Br. 7-9; Pet. Br. 30-31 (setting forth "two alternative tests" for determining whether Congress intended to diminish). Thus, while acknowledging limited exceptions to its proposed rule, the United States appears to argue that an Act of Congress may be found to diminish a reservation only when it employs "unambiguous language of cession" *and* either grants "unconditional compensation to the Indians" or is accompanied by "an unequivocal and widely held contemporaneous understanding that the reservation is diminished." U.S. Br. 9, 23; accord Pet. Br. 30-31.

Apart from its inconsistency with this Court's decisions, there are several difficulties with the Solicitor General's proposed test.[4] *First*, to the extent that it requires "unambiguous language of cession," the United States' approach ignores obvious differences in how the various surplus land Acts originated. As this Court has repeatedly

[4] The United States is simply wrong in suggesting that the "bright-line rule" it advances was "articulated in *Solem*." U.S. Br. 24 n.32; see also *id.* at 7 (stating that *Solem* "establishes a clear-statement rule"). The Court indicated in *Solem* that "[w]hen [unambiguous] language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an *almost insurmountable presumption* that Congress meant for the tribe's reservation to be diminished." 465 U.S. at 470-71 (emphasis added). The Solicitor General would turn that observation on its head: while the two factors identified by the *Solem* Court in combination *compel* a finding of diminishment, the Court nowhere suggested that both (or, for that matter, either one) are *necessary* for a finding of diminishment. To the contrary, *Solem* itself restated the variety of considerations previously regarded as pertinent in ascertaining congressional intent, and proceeded to examine those factors as they related to the 1908 Cheyenne River Act. *Id.* at 470-80.



recognized, some of those Acts had their genesis in agreements with the affected Indians, which Congress merely ratified, whereas others represented "unilateral action by Congress." *DeCoteau*, 420 U.S. at 448. See also *Rosebud*, 430 U.S. at 587, 597-99 & n.20, 608-09. One would expect language regarding "cession" to appear only in Acts that originated as agreements because " 'cession' refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign." *Id.* at 597. And as a consequence of this Court's holding in *Lone Wolf* that Congress need not reach an agreement with tribes in order to diminish reservations,[5] express language of cession was much less common after 1903 than it was before. See National Indian Law Library, Allotment/Cession Statutes, Doc. No. 002279, table B (1973) (listing 25 Acts employing language of outright cession, 23 of which were passed prior to *Lone Wolf*).[6]

*Second*, in placing great emphasis on the existence of "an unconditional commitment from Congress to compensate the Indian tribe" (U.S. Br. 8, 12-14), the Solicitor General's test ignores not only this Court's decisions but also the history of Congress's allotment policy. To begin

[5] See *Solem*, 465 U.S. at 470 n.11; *Rosebud*, 430 U.S. at 587-88, 593-95 & nn.13, 17, 597-98 & nn.19-20, 608-09.

[6] We note, moreover, that the typical operative language found in the pre-1903 agreements—a series of overlapping synonyms for "relinquish"—is precisely what one would expect to find in a contract that is both aimed at securing the relinquishment of rights and drafted by the beneficiary of such relinquishment. See, *e.g.*, *DeCoteau*, 420 U.S. at 445 (ratified agreement provided that Indians would "cede, sell, relinquish, and convey * * * all of their claim, right, title, and interest"); *id.* at 439 & n.21 (setting forth the operative language from numerous 1891 agreements ratified by Congress). The overwhelming clarity of the operative language of these agreements reflects, in our view, the nature of the instrument rather than the strength of Congress's intent.

with, the absence of a "sum certain" payment was expressly found consistent with diminishment in *Rosebud*. See 430 U.S. at 598 n.20. Nothing in *Solem* altered that holding.[7] Moreover, because after 1903 Congress, under the authority of *Lone Wolf*, no longer needed to obtain tribal consent to a change in reservation boundaries, it had less need to make an unconditional commitment concerning payment to induce the Indians to agree to diminishment.

*Third*, in permitting an exception to its "clear-statement" rule only where there was a widely held contemporaneous understanding that the reservation was diminished (see U.S. Br. 8-9, 11, 22-23)—and in requiring that the understanding *be shared by the Indians* and manifested by "an agreement of cession" (*id.* at 23)—the Solicitor General's test wholly ignores the import of *Lone Wolf*. That decision held that Congress has the power unilaterally to diminish reservations *without* tribal consent, even in derogation of treaty rights. Again and again, this Court has recognized the importance of *Lone Wolf* in understanding Congress's intent. See *Solem*, 465 U.S. at 470 n.11; *Rosebud*, 430 U.S. at 587-88, 593-95 & nn.13, 17, 597-98 & nn.19-20, 608-09. In discerning that intent, the views of the affected Indians are no more relevant than those of the Executive or other parties with an interest in the legislative process. Perhaps more fundamentally, the Solicitor General's suggestion that the understanding of the Indians regarding the effect of an Act of Congress must be expressed through a vote for cession would, as a practical matter, substantially undercut the holding of *Lone Wolf*.

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[7] In addition, the United States' position overlooks "the belief shared by Congress and the Executive that the Indians were not entitled to compensation upon the abolition of an *executive order reservation*," *Sioux Tribe v. United States*, 316 U.S. 317, 330 (1942) (emphasis added); Congress's failure to offer the Indians a sum certain accordingly says little about congressional intent when such a reservation is involved.



In sum, this Court should reject petitioner's and the United States' invitation to abandon its traditional approach to discerning Congress's intent in cases involving diminishment of reservations. In this case, as in previous cases, the Court should examine all of the relevant factors bearing on congressional purpose. We submit that all of these considerations compel the conclusion that the allotment Acts affecting the Uintah Reservation resulted in a diminishment of reservation boundaries. Respondent and its other *amici* address the legislative history and other circumstances surrounding enactment of the Acts. We therefore devote the remainder of our argument to an examination of the single most important factor: the plain language of the statutes.

## II. THE 1902 ACT, AS AMENDED, UNEQUIVOCALLY DIMINISHED THE UINTAH RESERVATION.

### A. Congress Chose Operative Language Precisely Suited To Diminishment By Directing That All Unallotted Lands "Shall Be Restored To The Public Domain."

The 1902 Act allotting the Uintah Indian Reservation contained the operative language by which Congress, after several delays to resolve administrative matters, opened the reservation to non-Indian settlers in 1905. In the 1902 Act, Congress directed that all lands remaining after allotment *"shall be restored to the public domain."* Act of May 27, 1902, ch. 888, 32 Stat. 245 (emphasis added). In every one of this Court's decisions concerning diminishment of an Indian reservation, the phrase "restored to the public domain" has been viewed as depriving the land in question of its reservation status. Indeed, this Court itself has repeatedly employed the phrase as a *synonym* for loss of such status.

This is only logical. When the federal government reserves a tract for any purpose (for example, when it creates an Indian reservation), the tract is severed from

the public domain. Land is *removed* from the the public domain in order to create Indian reservations; *restoring* that same land to the public domain logically terminates its reserved status. See *Seymour,* 368 U.S. at 354 (quoting statute which "restored to the public domain" certain lands while stating that other lands were "still reserved").

Thus in *Seymour* a unanimous Court explained that an 1892 Act providing that the North Half of the Colville Reservation be "vacated and restored to the public domain" diminished that reservation. 368 U.S. at 354.[8] Moreover, in *Seymour* the Court itself twice employed the phrase "restored to the public domain" as a rough synonym for diminishment. In disagreeing with the Washington courts' conclusion that a 1906 Act had disestablished the South Half of the Colville Reservation, this Court criticized the lower courts for "ignor[ing] important differences" between the 1906 Act "and the provisions of the 1892 Act restoring the North Half of the reservation to the public domain." 368 U.S. at 355. See also *id.* at 353 (trial court's finding of disestablishment described as a conclusion, among other things, that "the land in question [had been] restored to the public domain").[9]

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[8] In an effort to distinguish *Seymour,* both petitioner and the United States seize on the word "vacates" in the 1892 Act, suggesting that this single word "expresses a concept of extinguishment completely absent from the language at issue here." U.S. Br. 17 n.23; Pet. Br. 38-39. This argument, however, ignores the fact that elsewhere in the 1892 Act the phrase "restored to the public domain" is used without the word "vacate." See Act of July 1, 1892, ch. 140, § 8, 27 Stat. 63.

[9] Contrary to the Solicitor General's suggestion (see U.S. Br. 17 n.23), this Court's discussion of the 1892 Act in *Seymour* cannot be brushed aside as an "implicit[] assum[ption]" or as remarks made "in passing." Rather, the *Seymour* Court's threshold determination that "the size of [the Colville Reservation] was diminished" by Congress's 1892 Act formed the basis for its analysis, by way of comparison, of the 1906 Act. See 368 U.S. at 354.



In *Mattz v. Arnett,* 412 U.S. 481 (1973), the Court held that another Act passed by Congress in 1892 did not disestablish the Klamath River Reservation in California. Noting that Congress "was fully aware" of how to bring about diminishment, and that the statute under review was passed "just two weeks after the 1892 Act" involved in *Seymour,* the Court cited the latter as an example of Congress using "clear language of express termination when that result is desired." *Id.* at 504 n.22.

This consistent usage was carried forward in *DeCoteau v. District County Court,* 420 U.S. 425 (1975), where even the Court's phrasing of the question presented reflected the notion that land restored "to the public domain" was no longer part of a reservation. See *id.* at 426 ("These two cases * * * raise the single question whether the Lake Traverse Indian Reservation * * * was terminated and *returned to the public domain,* by the Act of Mar. 3, 1891 * * *.") (emphasis added). What is more, this Court quoted similar terminology employed by the court below and by sponsors of the legislation. *Id.* at 430 (" 'became part of the public domain' ") (quoting decision below, 211 N.W.2d 843, 845), 441 (" 'surrender of a large portion of their reservation to the public domain' ") (quoting remarks of Sen. Dawes, 22 Cong. Rec. 3789 (1891)). Finally, in pointing out the similarity between the operative language of express cession in the Indian agreement under review and language in other agreements ratified in the same statute, the Court stated: "That the lands ceded in the other agreements were *returned to the public domain, stripped of reservation status,* can hardly be questioned * * *. The sponsors of the legislation stated repeatedly that the ratified agreements would *return* the ceded lands *to the 'public domain.'* " *Id.* at 446 (emphasis added). This is clear evidence of the Court's conviction that restoration of reservation lands "to the public domain" would necessarily "strip[]" those lands "of reservation status."

Similarly, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), all Members of this Court agreed that an 1889 Act which ordered a portion of the Great Sioux Reservation "restored to the public domain" altered reservation boundaries. *Id.* at 589 & n.5 (indicating that this language effected a "termination of Reservation status"); *id.* at 618 (Marshall, J., joined by Brennan and Stewart, JJ., dissenting) (citing the 1889 Act as "yet another example" of Congress's use of "clear language of express termination").[10] In *Rosebud*, the Court also reaffirmed what it had said in *Mattz* concerning the 1892 Act that "vacated and restored to the public domain" the North Half of the Colville Reservation, noting once again that this language clearly indicated an intent to alter reservation boundaries. *Id.* at 588 n.4; *id.* at 618 (Marshall, J., joined by Brennan and Stewart, JJ., dissenting). See also *Sioux Tribe v. United States*, 316 U.S.

[10] The United States suggests that in *Rosebud* this Court merely "accepted the parties' understanding" concerning the effect of the 1889 Act. U.S. Br. 17 n.23. That reading of *Rosebud*, however, finds no support in the majority opinion and is plainly inconsistent with Justice Marshall's dissent. The Solicitor General also notes that three-fourths of the Sioux agreed to the 1889 Act's termination, whereas Indian consent was not obtained in this case. But putting aside the fact that the 1889 Act was passed well before this Court's decision in *Lone Wolf*, at a time when such consent was required (unlike the 1902-05 statutes involved in this case, which straddled *Lone Wolf*), this argument lacks support in the *Rosebud* opinions. Justice Marshall made no mention of consent, pointing only to the language of the 1889 Act (430 U.S. at 618); the majority focused on the restoration language and mentioned consent only in passing in a footnote (*id.* at 587 & n.2). Petitioner's suggestion (Br. 48) that something more is needed to effect diminishment besides language restoring land to the public domain—a broader variant of his claim concerning the presence of the word "vacate" in the 1892 Act in *Seymour* (see note 8, *supra*)—is of course inconsistent with *Rosebud*, where the statute described by this Court as effecting a "termination of Reservation status" (430 U.S. at 589 n.5) merely ordered reservation lands "restored to the public domain."



317 (1942) (repeatedly employing phrase "restore to the public domain" as synonym for diminishment).

Finally, in *Solem*, the Court considered a statute whose operative language simply authorized the Secretary of the Interior to "sell and dispose" of reservation lands. 465 U.S. at 472. "The balance of the Cheyenne River Act" included a provision governing timber rights—located in the very last line of the statute, some three pages of small print after the operative language just cited—which provided that "Indians residing upon their allotments" in certain townships "shall have the right to use timber in said townships, * * * for domestic purposes only as long as the lands remain *part of the public domain.*" Act of May 29, 1908, ch. 218, 35 Stat. 460, 464 (emphasis added). Even this oblique and "isolated" reference to land situated in the "public domain," the Court stated, "[u]ndisputedly * * * support[s] petitioners' view that the Cheyenne River Act diminished the reservation." *Solem*, 465 U.S. at 475. Nevertheless, the Court concluded that the two phrases invoked by the petitioners in *Solem* (the reference to "public domain" and another provision allowing for allotments within "the reservation thus diminished") could not, "when balanced against the * * * Act's limited goal[s]" as expressed in its operative language, "carry the burden of establishing an *express* congressional purpose to diminish." *Ibid.* (emphasis added). In a footnote, the Court added, somewhat tentatively, that there was "considerable doubt as to what Congress meant in using these phrases" because the unallotted lands to which the timber provision referred "*could* be conceived of as being in the 'public domain' inasmuch as they were available for settlement." *Id.* at 475 n.17 (emphasis added).

Contrary to the assertions of petitioner and the United States (Pet. Br. 46-47; U.S. Br. 16-18), *Solem* did not deviate from this Court's consistent understanding of the meaning of statutory language ordering the return or restoration of reservation lands to the public domain.

The reference to the public domain in the statute at issue in *Solem* was not the operative language of the statute; it was not the language chosen by Congress to open up reservation lands. Instead, the operative "sell and dispose" language of the Act considered in *Solem* was identical to that held not to diminish a reservation in *Seymour*. Even so, the Court found the mere mention of "public domain" to be evidence of diminishment,[11] although the Court understandably refused to rely on an "isolated" phrase providing for timber cutting on part of the reservation to establish the requisite clear congressional intent to diminish a large section of the reserved land.

Not surprisingly, a long line of lower court opinions in surplus land Act cases have followed this Court's lead in concluding that language ordering the return or restoration of land to the public domain has the effect of diminishing a reservation.[12] Indeed, in *State v. Perank*, the com-

[11] It should be noted that, even had it not been isolated from the operative portion of the statute, the reference to the "public domain" in the Act before the Court in *Solem* would have been less probative of diminishment than the 1902 statute at issue here: there was no mention in the *Solem* statute of "return" or "restoration" of reservation lands. Compare U.S. Br. 16-17 (incorrectly stating that this Court in *Solem* "considered the effect of a statute referring to a restoration of reservation lands to the public domain"). The words "restoration" or "return" obviously suggest the reversion of lands to a status predating (and legally inconsistent with) reservation status.

[12] See, *e.g.*, *Russ v. Wilkins*, 624 F.2d 914, 915, 924 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 696 (9th Cir. 1976); *United States ex rel. Feather v. Erickson*, 489 F.2d 99, 100 (8th Cir. 1973), rev'd on other grounds sub nom. *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 687-88 (8th Cir. 1973); *Beardslee v. United States*, 387 F.2d 280, 285 (8th Cir. 1967) (Blackmun, J.); *DeMarrias v. South Dakota*, 319 F.2d 845, 846 (9th Cir. 1963). See also *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 817 n.8 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984); *United States ex rel. Cook v.*



panion case to the decision below, the Utah Supreme Court noted that it was able to locate only one decision holding that such language does not disestablish the affected portion of a reservation. J.A. 37.[13]

In sum, under this Court's and the lower courts' consistent understanding, where the operative language of a surplus land Act is a directive to restore or return reservation lands "to the public domain," Congress has chosen language that is " 'precisely suited' to disestablishment." *Rosebud*, 430 U.S. at 597 (quoting *DeCoteau*, 420 U.S. at 445). Such an unequivocal expression of intent to alter reservation boundaries should be accorded all the more weight, moreover, because at the time the surplus land statutes were enacted, Congress had every reason *not* to specify such an effect on boundaries.[14] To hold

*Parkinson*, 525 F.2d 120, 124 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); *Putnam v. United States*, 248 F.2d 292, 295 (8th Cir. 1957). See generally J.A. 40-41.

[13] The one opinion so holding—and the only such case cited by petitioner or his supporting *amici*—is *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1092 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986), which also considered the statutes at issue in this case. *Ute Indian Tribe*'s conclusion, which related to the Uncompahgre rather than the Uintah Valley Reservation, has been roundly criticized by a subsequent panel of the Tenth Circuit as "unexamined and unsupported." *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400 (10th Cir.), cert. denied, 498 U.S. 1012 (1990). Further, the district court in *Ute Indian Tribe* found it "abundantly clear" that Congress diminished the Uintah Reservation in 1888 when it ordered the Gilsonite Strip "restored to the public domain," a conclusion the parties did not dispute on appeal. See 521 F. Supp. at 1099; page 3, *supra*. A majority of the judges who heard the *en banc* appeal agreed that the Gilsonite Strip Act was an example of statutory language explicitly diminishing the Uintah Reservation. 773 F.2d at 1098 (Seymour, J., joined by Holloway, C.J., McKay and Logan, JJ., concurring); *id.* at 1108 (Seth, J., joined by Barrett, J., dissenting).

[14] At the time that the surplus land Acts at issue here were enacted, "Indian lands were judicially defined to include only those lands in which the Indians *held some form of property interest*: trust lands, individual allotments, and, to a more limited

otherwise would be contrary to settled law and would throw into doubt the heretofore settled legal status of many tracts of lands across the country that Congress has "restored to the public domain."

**B. The 1903, 1904, And 1905 Appropriations Acts Did Not Supplant The 1902 Act Nor Did They Reflect A Change In Congress's "Baseline Purpose" To Diminish The Uintah Reservation.**

Given the history of congressional enactments affecting the lands at issue in this case, the 1905 Act "cannot, and should not, be read as if it were the first time Congress had addressed itself to the diminution of" the Uintah Reservation. *Rosebud,* 430 U.S. at 592; see also *id.* at 606 n.30. Not only the 1902 Act, but also the Acts of 1894 and 1898, and even the 1888 cession of the Gilsonite Strip, indicate that Congress fully intended to change the reservation's boundaries. Congress's "unmistakable baseline purpose of disestablishment" (*Rosebud,*

degree, opened lands that had not been claimed by non-Indians." *Solem,* 465 U.S. at 468 (emphasis added). *See also Bates v. Clark,* 95 U.S. 204, 208 (1877); *Ute Indian Tribe,* 521 F. Supp. at 1081-83. Indeed, it was not until 1948—more than a decade after the allotment policy was abandoned—that Congress "uncouple[d] reservation status from Indian ownership." *Solem,* 465 U.S. at 468. Thus, the Congresses that passed the surplus land Acts likely would have been of the view that unallotted lands would cease to be Indian lands (and therefore part of any reservation) at the moment they were sold to non-Indians, if not earlier. See *Pittsburg & Midway Coal Mining Co. v. Yazzie,* 909 F.2d 1387, 1394 (10th Cir.), cert. denied, 498 U.S. 1012 (1990) ("The most obvious reason for congressional failure to distinguish between title and boundary (jurisdictional) interests is that Congress did not see a distinction and *thought that both interests terminated when either one did* * * *.") (emphasis added). Notwithstanding this history, the Court has "never been willing to extrapolate * * * a specific congressional purpose of diminishing reservations with the passage of every surplus land Act." *Solem,* 465 U.S. at 468-69. This background nevertheless makes clear that any lack of precision on Congress's part should not be fatal to a finding of disestablishment.



430 U.S. at 592), moreover, was not abandoned in the 1903, 1904 and 1905 Appropriations Acts, which did not revoke or alter the 1902 Act's operative language but merely extended the deadline for opening the reservation and made other procedural changes.

The 1902 Act, of course, was not Congress's first surplus land Act directed at the Uintah Reservation. As explained above, in 1888 Congress removed the small mineral-rich area known as the Gilsonite Strip from the reservation. Act of May 24, 1888, ch. 310, 25 Stat. 157. Significantly, both the stated purpose and the operative language of the 1888 Act mirrors that later used by Congress in 1902; the Gilsonite Strip was "declared to be public lands of the United States and restored to the public domain." *Ibid.* In 1894 Congress sought to further diminish the Uintah Reservation, authorizing a commission to negotiate with the Utes for "the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians * * *. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286.

When the 1894 Commission's mission was delayed by negotiations with the neighboring Uncompahgres, Congress authorized the creation of a new commission in 1898. Act of June 4, 1898, ch. 376, 30 Stat. 429. Here again, a stated purpose of the 1898 Act was "to obtain the cession to the United States of all lands within [the Uintah Indian Reservation] not * * * allotted." *Ibid.* Similarly, the new commission was explicitly directed to seek the Utes' agreement to "the cession to the United States" of all unallotted lands within the reservation. *Ibid.* The 1898 Commission was, however, unable to gain the Utes' consent. Each of these three Acts indicates that Congress had in mind the diminution of the Uintah Reservation. Indeed, no one disputes that the reservation was diminished by the 1888 Act.

The 1902 Act carried forward Congress's "unmistakable baseline purpose" to diminish the Uintah Reservation. *Rosebud*, 430 U.S. at 592. Once again, the 1902 Act provided for the allotment of Uintah Reservation lands with the consent of a majority of adult male Utes. Act of May 27, 1902, ch. 888, 32 Stat. 245. The Act also directed that allotments be made by October 1, 1903. *Ibid.* And, in words virtually identical to those of the 1888 Act diminishing the reservation by removing the Gilsonite Strip, the Act mandated that after October 1, 1903, all unallotted lands "shall be restored to the public domain." *Ibid.* Unallotted lands "so restored to the public domain" were then to be sold, with the proceeds used first to reimburse the United States for monies advanced to the Indians and second "for the benefit of [the] Indians," as directed by the Secretary of the Interior. *Ibid.*[15]

Both petitioner and the United States, however, urge this Court to disregard this unequivocal evidence of Congress's "baseline purpose" to alter the boundaries of the Uintah Reservation. In essence, they suggest that various extensions of time and other procedural provisions enacted by the Appropriations Acts of 1903, 1904, and 1905 represented an abandonment by Congress of its previous plan to diminish the Uintah Reservation. Essentially urging this Court to view the three Appropriations Acts as entirely distinct from the 1902 Act, the Solicitor

[15] Among other things, the 1902 Act also appropriated $70,064.48 "to be paid to the Uintah and the White River tribes of Ute Indians" when a majority of the adult males consented to both "the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided." Act of May 27, 1902, ch. 888, 32 Stat. 245. One month after passing the 1902 Act, Congress amended it by passing a Joint Resolution which, among other things, directed that the $70,064.48 appropriated for payment to the Utes be paid out "without awaiting their action upon the proposed allotment * * * *and the restoration of the surplus lands to the public domain.*" J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902) (emphasis added).



General stresses (1) the absence of restoration-to-the-public-domain language in the 1905 Appropriations Act, and (2) the fact that the Utes ultimately did not consent to the diminishment, as was contemplated in the 1902 Act. U.S. Br. 16-20. These arguments are meritless.

To begin with, it is simply impossible to view the 1903, 1904 and 1905 Appropriations Acts as wholly separate and independent of the 1902 Act. See generally J.A. 44-57. Every one of the later Appropriations Acts extends the original deadline first set in the 1902 Act. Moreover, like the 1902 Joint Resolution, *all* of these Acts make explicit (and often repeated) reference to the 1902 Act. A stated purpose of both the 1903 and 1904 Acts, for example, was to "carry out" the "purpose" or "purposes" of the 1902 Act. Act of Mar. 3, 1903, ch. 994, 32 Stat. 982, 997-998; Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-08. Similarly, in the 1905 Act Congress specifically provided that "[t]he proceeds of the sale of such [unallotted] lands shall be applied as provided in the [1902 Act], *and the acts amendatory thereof and supplementary thereto.*" Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70 (emphasis added). As the highlighted language demonstrates, the Congress that passed the 1905 Act clearly viewed the 1902 statute as the basic legislation upon which subsequent Acts were built.

The interconnection of these statutes is confirmed by President Roosevelt's July 14, 1905, proclamation opening the unallotted lands to settlement as of August 28, 1905, which began:

> Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat. 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, 'shall be restored to the public domain * * *.'
>
> And, whereas, the time for the opening of said unallotted lands was extended * * * by the Act of

> Congress approved Mar. 3, 1903 * * * and * * * by the Act of Congress, approved Apr. 21, 1904 * * * and * * * by the Act of Congress, approved Mar. 3, 1905 * * *.

Presidential Proclamation of July 14, 1905, 34 Stat. 3119. Clearly the President understood the 1902 Act as bringing about the opening of the Uintah Reservation, with the 1903, 1904 and 1905 Acts merely extending the time when that opening would occur. A similar Executive Order was held to be evidence of an intent to diminish the reservation at issue in *Rosebud*. 430 U.S. at 602-03. In that case, as in this one, the President noted both that the Indian tribe had relinquished the lands, and that the lands were open to settlement only under the homestead and town-site laws.

What is more, the 1905 Act simply cannot sensibly be read without the 1902 Act. The 1905 Act lacks a great many features that are required to make it at all meaningful—features that can be supplied only by the 1902 Act. The 1905 Act makes no provision whatever for the allotment of land to the Utes, but merely refers to the remaining "unallotted lands"; it likewise makes no mention of the amount of land to be allotted to the Indians; it sets no price for the lands that are opened for settlement; and it makes no reference to what will be done with the proceeds of the sale of unallotted lands. *All* of those matters are spelled out in the 1902 Act. As the Utah Supreme Court explained in *Perank*, "in enacting the 1905 Act, Congress acted on the premise that the provisions of the 1902 and 1903 Acts and the 1902 Joint Resolution continued in effect." J.A. 55.[16]

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[16] A number of other courts have reached the same conclusion, holding that the lands in question were "restored to the public domain" under the 1902 Act, with the 1905 Act merely extending the deadline and working other minor changes. See *Hanson v. United States*, 153 F.2d 162, 162-63 (10th Cir. 1946); *United States v. Boss*, 160 F. 132, 133 (D. Utah 1906); *Uintah and White River Bands of Ute Indians v. United States*, 139 Ct. Cl. 1, 21-23 (1957); *Sowards v. Meagher*, 108 P. 1112, 1114 (Utah 1910).



Nor does the fact that Congress failed to repeat the operative restoration language in 1905 make any difference. Congress had no need to do so. The 1902 Act had clearly indicated the impact of the allotment plan on reservation boundaries in language "precisely suited" to communicate Congress's intentions. Petitioner and his supporting *amici*, however, argue that the 1905 Act charted a new course concerning reservation boundaries, and that this is demonstrated by the presence of a single sentence in the 1905 Act providing that the unallotted lands "shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President." Act of Mar. 3, 1905, ch. 1749, 33 Stat. 1048, 1069-70.

This argument lacks merit. The 1905 Act in no way purports to amend the operative "restore to the public domain" language. Petitioner thus is reduced to arguing that the above-quoted "homestead and town-site" provision is incompatible with diminishment and so sets aside the 1902 Act *sub silentio*. This argument, however, is hard to square with the fact that the 1902 Act itself mentions (and thus foresees) that persons will "enter[]" the unallotted lands "under the homestead law." Act of May 27, 1902, ch. 888, 32 Stat. 245. Compare Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70.[17] In any

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[17] By indicating that the manner of entry onto the unallotted lands would be that provided in the homestead and town-site laws, Congress intended to prevent speculators, rather than individual settlers, from grabbing the lands. The legislative history makes this abundantly clear. See S. Rep. No. 4240, 58th Cong., 3d Sess. 30 (1905); 39 Cong. Rec. 1185-86 (1905) (remarks of Rep. Howell). This points up another flaw in petitioner's argument: the language of the 1905 Act that allegedly supplanted the 1902 Act's restoration language had a limited lifespan. After five years, the restrictions on the manner of settlement were to lapse and all unallotted lands that had not been disposed of would "be sold and disposed of for cash," with "[t]he proceeds" to be "applied as provided in the act of Congress of May twenty-seventh, nineteen hundred and

event, the argument is foreclosed by this Court's decisions in *DeCoteau* and *Rosebud*. In the latter case, the Court provided that the lands in question "shall be disposed of under the general provisions of the homestead and town-site laws, and shall be opened to settlement and entry by proclamation of the President." Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254, 257.[18] See also *DeCoteau*, 420 U.S. at 442.

The language of the Act at issue in *Rosebud*, like that of the 1905 Act, merely prescribes the manner of distributing the unallotted lands to non-Indian settlers. The operative language expressing congressional intent to diminish must be found elsewhere—in this case, as in *Rosebud*. In *Rosebud*, article I of the relevant Act provided that the lands in question were "cede[d], grant[ed, etc.]," and article V specified that the ceded lands were to be disposed of under the homestead and town-site laws. The 1902 Uintah Reservation Act restored the unallotted Uintah Reservation lands to the public domain, and the 1905 Act added provisions regulating the means by which

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two, and the acts amendatory thereof and supplemental thereto." Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70.

[18] Significantly, the Congress that enacted the 1905 Act was aware that it was adopting the very language it had used in the Rosebud Reservation opening, where this Court found a congressional intent to diminish. During the floor debate in the House, Rep. Sherman explained that "the idea" behind the 1905 Act's provisions was "to have such rules and regulations as were prescribed, for instance, in the Rosebud Reservation opening * * *." 39 Cong. Rec. 1183 (1905). The Report of the Senate Subcommittee on Indian Affairs demonstrates the same cognizance of the source of the "homestead and town-site" provisions. See Letter from W.A. Richards, Comm'r, General Land Office, to Secretary of the Interior *reprinted in* S. Rep. No. 4240, 58th Cong., 3d Sess. 15 (1905) ("The provisions of this bill prescribing the manner in which the lands are to be opened are similar to the provisions under which the Rosebud Indian Reservation * * * [was] opened during the past year."); see also Letter from E. A. Hitchcock, Secretary of the Interior to The President of the United States, *reprinted in* 39 Cong. Rec. 1184 (1905). This history, of course, strongly suggests that Congress meant to diminish the Uintah Reservation.



settlers could claim and purchase the lands on the diminished reservation. In clear contrast, the Act at issue in *Mattz v. Arnett* contained similar language opening the disputed lands to settlement under the homestead laws, but no operative language indicating a congressional intent to change reservation boundaries. Act of June 17, 1892, ch. 120, 27 Stat. 52.

Finally, petitioner and the United States are mistaken in suggesting that the restoration ordered by the 1902 Act somehow never occurred because the Utes never gave their consent to a diminishment, as was contemplated in the 1902 Act. To be sure, Congress in 1903 did eliminate the requirement of consent to allotment, specifically instructing the Department of the Interior to

> send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, *then the Secretary of the Interior shall cause to be allotted* to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act * * *.

32 Stat. 982, 997 (emphasis added). In deliberately removing the 1902 Act's consent requirement, however, Congress acted not in capitulation but out of empowerment. Only two months before the 1903 Act was passed, this Court issued its decision in *Lone Wolf*, holding that Congress may alter reservation boundaries without tribal consent. *Lone Wolf* was, and is, a landmark decision, and it did not escape Congress's notice. See J.A. 49-50; see also *Rosebud*, 430 U.S. at 587-88, 594, 598. Thus, as petitioner himself at one point concedes (Pet. Br. 37 n.21), in amending the 1902 Act in 1903 "Congress understandably relied on this holding as authorizing it to diminish unilaterally the Reservation boundaries." *Rosebud*, 430 U.S. at 594. After the 1903 Act, Congress

expressed no further concern with the presence or absence of tribal consent to the allotment of the Uintah Reservation.

In sum, the 1902 Act's operative language unambiguously diminished the Uintah Reservation, and that baseline purpose was not altered by subsequent Acts.[19] There may be room to question whether Congress's action was wise; the Court has observed, in assessing surplus land Acts from this period in our history, that "much has changed since then, and if Congress had it to do over again it might choose a different course." *Rosebud,* 430 U.S. at 615. Nevertheless, the Court also has made clear that its "task" in these cases is the "narrow one" of discerning the intent of the contemporaneous Congress: the Court "cannot remake history." *DeCoteau,* 420 U.S. at 449. Here, Congress's intent to diminish is clear.

## CONCLUSION

The judgment of the Utah Supreme Court should be affirmed.

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[19] The United States also contends that "the absence of a specific statutory description of the land * * * removed from the Reservation" weighs against a finding of diminishment in this case. U.S. Br. 20 n.28. Yet it is difficult to imagine how Congress *could* have provided a specific description of the relinquished lands, while at the same time permitting the Indians first to select their allotments. Not surprisingly, the cessions in *DeCoteau* and *Rosebud,* like the boundary alterations here, were limited to land remaining unallotted after the Indians had their choice. Thus, the Solicitor General is simply mistaken in claiming that "[i]n *DeCoteau* and *Rosebud,* the relevant statutes precisely described the areas that were found to have been removed from [the] reservation." *Ibid.* See *DeCoteau,* 420 U.S. at 439 & n.22 (quoting Act of Mar. 3, 1891, 26 Stat. 1036); *Rosebud,* 430 U.S. at 597, 607, 613. In *Rosebud,* of course, the 1904, 1907 and 1910 Acts did set forth boundaries within which the unallotted lands to be ceded were located, but the obvious reason for including those boundaries was to make clear that Congress was legislating with respect to only a part of the Sioux Reservation.



Respectfully submitted,

CHARLES ROTHFELD
ALAN UNTEREINER
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol St., N.W.
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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ROBERT P. HAGEN,
*Petitioner,*

v.

STATE OF UTAH,
*Respondent.*

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**On Writ of Certiorari to the Utah Supreme Court**

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## BRIEF FOR DUCHESNE COUNTY, UTAH, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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HERBERT WM. GILLESPIE
Duchesne County Attorney
P.O. Box 206
Duchesne, UT 84021
(801) 738-2435

JESSE C. TRENTADUE
*Counsel of Record*
SUITTER, AXLAND & HANSON
175 South West Temple
Salt Lake City, UT 84101
(801) 532-7300

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## BRIEF FOR DUCHESNE COUNTY, UTAH, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

### INTEREST OF *AMICUS CURIAE*

The concern that prompts the filing of this Brief can be simply stated. Prior to the litigation of this reservation boundary issue, this Court, the United States and the Tribe itself had taken the position that the Ute Tribe's reservation consisted of 1 million acres, not the 4 million acres encompassed within the boundaries of the original Uncompahgre and original Uintah Reservations. More than 18,000 residents of Duchesne County and Uintah County thus face the prospect of being suddenly thrust into the status of residents of an Indian reservation, where their officials would have only limited jurisdiction and where they would have no elective voice in the governance of their affairs and property by the Tribe. For its part, the Ute Tribe has enacted a comprehensive Tribal Code which, by its terms, is applicable to Indians and non-Indians alike throughout both historic reservation areas. *See e.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Compared to *Solem v. Bartlett*, 465 U.S. 463 (1984), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Mattz v. Arnett*, 412 U.S. 481 (1973), or *Seymour v. Superintendent*, 368 U.S. 351 (1962), more people, more area and more resources are at stake here because of the conflicting decisions of the Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit. In this respect, *Amicus Curiae* Duchesne County is especially concerned. The original boundaries of the Uintah Reservation encompass the area of Duchesne County that is most populated and developed. *See*, for example, *Brief for the City of Roosevelt, Utah, Amicus Curiae.*

### SUMMARY OF ARGUMENT

The Utah Supreme Court correctly concluded that the Uintah Act of May 27, 1902 (32 Stat. 245), Joint Appendix 159-160 (hereafter "JA") as amended, which

provided that the unallotted lands of the Uintah Reservation be restored to the public domain, constituted clear evidence of disestablishment, as this Court has recognized. In a conflicting opinion, the *en banc* majority of the court of appeals mistakenly believed that this Court's decision in *Solem* dictated "a different result," despite the fact that in *Solem* the Court indicated that it was following a path clearly marked by its prior decisions. The fundamental error of the *en banc* majority centered around a misconstruction of *Solem* regarding the significance of public domain terminology. Up front, *Solem* specially referenced public domain terminology in conjunction with other operative language that "strongly" suggested disestablishment and the *en banc* majority missed the point. *Solem* at 470, citing *Seymour v. Superintendent* at 355 (restored to public domain language). Instead, the *en banc* majority focused on a footnote in that portion of the *Solem* opinion directed only to miscellaneous provisions in the balance of the Solem Act. Even there, the *en banc* majority simply painted *Solem* with too broad a brush.

As a result, the *en banc* majority failed to take into account important factors uniformly understood to constitute explicit expressions of congressional intent to disestablish both the original Uintah and the original Uncompahgre Reservation. Moreover, the *en banc* majority ignored the unwavering position of the federal government since 1897 that the original Uncompahgre Reservation no longer exists (The United States, participating as *Amicus Curiae*, failed to inform the *en banc* court that the Uncompahgre documentation "compels" a conclusion that the reservation *was* disestablished, as the United States subsequently told this Court; instead, the United States simply took no position on this nearly identical *in pari materia* Act, and argued the other *in pari materia* Act *was not* intended to disestablish the original Uintah reservation.) Accordingly, the *en banc* majority paid little attention to the similarly long-standing administrative and congressional treatment of the original Uintah Reservation. Relying on what it deemed the "*Solem* standards,"



it then fashioned the second largest Indian reservation in the United States. In construing operative public domain language as it did, the *en banc* majority thus attempted to "remake history," which this Court admonished "cannot" be done in order to resurrect reservations that long ago ceased to exist. *DeCoteau*, 420 U.S. at 449; *accord Rosebud*, 430 U.S. at 615.

Squarely at issue here is the Uintah Act of May 27, 1902, 32 Stat. 245, JA 159-160 as amended, one in the series of surplus land statutes Congress passed between 1887 and 1920 when land areas once set aside as Indian reservations were opened for settlement pursuant to § 5 of the General Allotment Act of 1887, 24 Stat. 388. LD 13.[1] In the last thirty (30) years, this Court has addressed these difficult and complex questions a number of times to resolve similar conflicts and make clear important points of law. *Solem v. Bartlett*, 465 U.S. at 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962). The limited historical perspective of *Seymour* and *Mattz* (no disestablishment intended) was broadened considerably in *DeCoteau* and *Rosebud* (disestablishment intended), and *Solem* confirmed, while the end result could vary, congressional intent would always control. The Utah Supreme Court decided the issue within the guidelines of this precedent but the *en banc* majority did not.

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[1] The record on appeal includes a Joint Compendium of Legislative Documents and Joint Exhibits, which include Executive Orders, Presidential Proclamation and certain Secretarial Orders, compiled and used by the District court. In addition to formal citation form, these sources are referred to parenthetically by their corresponding index numbers, LD 1 to LD 217, and JX 1 to JX 485. *See Ute Indian Tribe*, JA 104, n.2, and *Ute Indian Tribe*, 521 F. Supp. at 1080, n.17. *Amicus Curiae* Duchesne County App. at 1a-332a, *infra*, sets forth the entire legislative history of both the Uncompahgre Acts and the Uintah Acts. *See, in pari materia* context of legislation and related arguments *supra*, at 2, *infra*, at 11-13, 14-27.

In *Ute Indian Tribe*, the *en banc* majority's conclusion that *Solem* "dictates" a different result with respect to the crux of this case, *i.e.* the significance of operative public domain terminology, is explicitly stated:

> The original expression 'return to the public domain' does *not* reliably establish the clear and unequivocal evidence of Congress' intent to change boundaries. *Solem*, 104 S.Ct. at 1166 [majority opinion].
>
> Our *conclusion* is that the phrase 'restore to the public domain' is *not* the same as a congressional state of mind to disestablish [majority opinion].
>
> Although the district court and the panel viewed this as language of cession, I believe that *Solem dictates* a different result [concurring opinion].
>
> Prior to *Solem*, 'public domain' language could have been construed as more conclusive evidence of disestablishment; following *Solem*, the term must be viewed as *ambiguous* in portent. . . [concurring opinion].
>
> Ultimately, I interpret *Solem* to *hold* that 'public domain' language standing alone is *insufficient* to support a finding of explicit congressional intent to disestablish [concurring opinion].

*Ute Indian Tribe v. Utah*, JA 99, 106, 107, 106 (emphasis added). And the extent to which the *en banc* majority departed from the principles set forth by this Court is specifically supported in a subsequent decision by a different panel of the court of appeals, as specifically noted by the Utah Supreme Court. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990) ("Moreover, our conclusion is unexamined and unsupported in the opinion"). *See* JA 37-41.



## ARGUMENT

**I. THE UNITED STATES, PARTICIPATING AS *AMICUS CURIAE* IN THE FEDERAL DISTRICT COURT AND THE COURT OF APPEALS, FAILED TO INFORM THOSE COURTS THAT UNCOMPAHGRE DOCUMENTATION COMPELS THE CONCLUSION THAT ONE RESERVATION WAS DISESTABLISHED, AS THE UNITED STATES SUBSEQUENTLY TOLD THIS COURT; INSTEAD, THE UNITED STATES SIMPLY TOOK NO POSITION ON THIS NEARLY IDENTICAL *IN PARI MATERIA* ACT, AND ARGUED THE OTHER *IN PARI MATERIA* ACT WAS NOT INTENDED TO DISESTABLISH THE ORIGINAL UINTAH RESERVATION. AFTER THE *EN BANC* DECISION, THE UNITED STATES THEN TOLD THIS COURT THAT THE *EN BANC* COURT WAS HALF-WRONG, BUT THE UNITED STATES HAS NOT MENTIONED ANY OF THIS IN THE BRIEFS JUST FILED IN THIS COURT INVOLVING THE SAME ACTS AND THE SAME RESERVATION. THE UTAH SUPREME COURT CANNOT BE FAULTED FOR FAILING TO FOLLOW THIS PATH.**

A. The History of the Reservations. The Ute Indian Tribe is a federally-recognized Indian tribe comprised of the Uintah, White River and Uncompahgre Bands. There are today approximately 1,800 enrolled members of the Tribe, nearly all of whom live on trust lands in the Uintah Basin of northeastern Utah. The dispute concerns not those lands or additional trust lands, which comprise about a million acres, but the surrounding area of 3 million acres, which had been set aside during the 1800's as the Uintah and Uncompahgre Reservations (JA 130). Nearly all of this disputed area lies within Duchesne and Uintah Counties. On the 4 million acres within the boundaries of the original reservations, the total non-Indian population is about 18,000. In 1975, the Tribe enacted a Law and Order Code asserting jurisdiction over the entire 4 million acre region on the basis that the area continued to retain reservation status despite turn-of-the

century legislation restoring the area to the public domain and despite the fact that at least in regard to one portion of the region—the original Uncompahgre Reservation—no agency of the federal government has treated it as an Indian Reservation since 1897, no tribal members live there and the United States agrees it does not exist. Memorandum of Petitioner at 4-6, *Andrus v. Utah,* 446 U.S. 500 (1980) Brief for the United States as *Amicus Curiae, Ute Indian Tribe v. State of Utah,* U.S. Supreme Court No. 85-1821 (November 1986).

The original Uncompahgre Reservation, created by Executive Order of January 5, 1882 (I Kappler 901), encompassed more than 1.9 million acres, nearly all of which is in Uintah County.[2] In the Act of August 15, 1894, ch.20, 28 Stat. 286, 337-338, App. 72a-73a, Congress directed that when a Presidential commission determined which lands would remain after allotments to the Uncompahgre Indians, those unallotted lands "shall, by proclamation, be restored to the public domain," [3] as the Commissioner of Indian Affairs stated.

The original Uintah Reservation, which had been created in the 1860's, consisted of more than two million acres, most of which is located in Duchesne County.[4] Pursuant to the Act of May 27, 1902, JA 159-160 (32 Stat. 245, 263), as amended, a Presidential Proclamation

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[2] *See e.g.,* [1892] Commissioner of Indian Aff. Rept., at 908 (JX 27) [1911] Commissioner of Indian Aff. Rept., at 92 (JX 353). ("JX" refers to the Joint Exhibits at trial.)

[3] *E.g.,* [1899] Commissioner of Indian Aff. Rept. at 543 (JX 117); [1911] Commissioner of Indian Aff. Rept. at 92 (JX 353). The reservation was merely a temporary executive order reserve from which allotments were to be made. The Uncompahgre Utes' ancestral home was originally in Colorado. See 111-112, n.7 (Seymour, J., concurring). *See generally, Sioux Tribe of Indians v. United States,* 316 U.S. 317 (1942).

[4] *See* Executive Order of Oct. 3, 1861 (I Kappler 900); Act of May 5, 1864 (13 Stat. 63); [1879] Commissioner of Indian Aff. Rept., at 331 (JX 3). The western-most part of the original reservation is located in Wasatch County and the eastern-most part is located in Uintah County.



of July 14, 1905 (34 Stat. 3119) JA 176-184, provided that all the unallotted and unreserved lands of the original Uintah reservation were restored to the public domain and opened for public settlement under the homestead and townsite laws.[5] The following exceptions were made from this Proclamation: (1) the Secretary of the Interior set aside approximately 250,000 acres as a grazing reserve for the Ute Indians pursuant to the Joint Resolution of June 19, 1902 (32 Stat. 744) JA 161-163; [6] (2) more than one million acres were added to the Uintah National Forest (34 Stat. 3116); and (3) some 56,000 acres were reserved for reservoir sites for Indians and general agricultural development under the Presidential Proclamation of August 3, 1905 (34 Stat. 3141, *as modified,* 34 Stat. 3143).[7] Of the balance, approximately 99,000 acres were allotted to individual Indians [8] and another 7,000 acres—the "Gilsonite Strip"—had already been restored to the public domain in 1888.[9]

After 1905 and for the next forty years, the tribal reserves, together with the allotted lands in the original Uncompahgre and Uintah Reservations, were treated as

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[5] *See, e.g., Uintah and White River Bands of Ute Indians v. United States,* 139 Ct.Cl. 1, 22 (1957); *Hanson v. United States,* 153 F.2d 162, 162-63 (10th Cir. 1946).

[6] More than 20,000 acres were also set aside by the Department of the Interior as a tribal timber reserve for the Ute Indians. *See e.g.,* Memorandum of Chief Supervisor of Forests, dated March 20, 1922, at 1 (JX 401). *See also,* 1932 Annual Report of the Uintah and Ouray Agency, at 1 (JX 427).

[7] In the Act of April 4, 1910 (36 Stat. 269, 285), Congress provided compensation and thereby extinguished all of the Ute Indians' right, title and interest to these reclamation lands. The Utes were also ultimately compensated for the lands opened to settlement and the National Forest withdrawals. *See e.g., Uintah and White River Bands of Ute Indians,* 139 Ct.Cl. at 6-7, 11.

[8] *See, e.g.,* [1911] Commissioner of Indian Aff. Rept., at 91 (JX 353).

[9] Act of May 24, 1888 (25 Stat. 157). App. 28a.

the Ute Indians' existing reservation.[10] On August 25, 1945, however, a 217,000 acre tract of opened and undisposed of land located within what had been part of the original Uintah Reservation was, by Proclamation of the Secretary of the Interior (10 Fed. Reg. 12409), restored to tribal ownership and "added to and made a part of the existing reservation" pursuant to Sections 3 and 7 of the 1934 Indian Reorganization Act (48 Stat. 984). Later, the Act of March 11, 1948 (62 Stat. 72), added an additional 500,000 acres—the so-called Hill Creek Extension—to the Ute Indians' reservation.[11]

There is no dispute that the tribal reserves together with the remaining allotments—some 360,000 acres—are "Indian country" within the meaning of 18 U.S.C. § 1151(a) and (c). Nor does anyone question that the surplus lands restored to tribal ownership and reservation status in 1945 and in 1948 (the Hill Creek Extension)—which total more than 700,000 acres—are also Indian country. This entire area, comprising more than one million acres,[12] had been considered the extent of the Tribe's existing reservation until recent years (*see, e.g.*, JA 131 (Seth, J., dissenting).[13]

As to the remaining portions of the two original reservations, where Congress ended Indian ownership long ago, the area has historically been the primary concern of the State and other governments. The population and

[10] *See e.g.*, JA 131 (Seth, J., dissenting); S. Doc. No. 78, 66th Cong., 1st Sess., at 1 (1919) (letter of the Secretary of Interior). *See* note 13 *infra*.

[11] A substantial portion of the Hill Creek Extension included lands located within the orignal Uncompahgre reservation. *See, e.g., Ute Indian Tribe*, 521 F. Supp. at 1108-1109.

[12] As a practical matter, checkerboarding has not been a concern. The trust lands are roughly contiguous and not widely interspersed with non-Indian owned lands.

[13] The Tribe has contested that only these lands were originally treated as its reservation. As the dissent concluded, however, the record establishes otherwise (*see* JA 131), a point the *en banc* majority did not dispute.



land use of these disputed 3 million acres are more than 90 percent non-Indian and, as indicated above, nearly all the enrolled members of the Tribe live elsewhere.[14] JA 130 (Seth, J., dissenting) Throughout the disputed area there are a substantial number of incorporated towns and cities (such as Roosevelt, Duchesne and Myton), and in recent years there has been significant natural resource, business and recreational development.

B. Federal District Court. In 1975, however, after enacting its Law and Order Code, the Ute Indian Tribe sued Duchesne County and the Cities of Roosevelt and Duchesne in federal district court.[15] The Tribe claimed extensive criminal and civil jurisdiction over non-Indians and further asserted that the original Uintah and Uncompahgre Indian Reservations, the combined area of which exceeds four million acres, presently exist to the full extent of their historic boundaries. After six years of litigation, the federal district court rendered an opinion holding that the original Uncompahgre Reservation had been disestablished by the Act of June 7, 1897 (30 Stat. 62, 87). App. 186a, *Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072 (D. Utah 1981). The court further held that the original Uintah Reservation had been diminished through: (1) the withdrawal of the so-called "Gilsonite Strip" pursuant to Act of May 24, 1888 (25 Stat. 157); App. 28a-29a. (2) the withdrawal of approximately one million acres for inclusion in the Uintah National Forest pursuant to the Act of March 3, 1905 (33 Stat. 1048, 1070); JA 168 and (3) the withdrawal of

[14] The tribal governmental unit is also located on the undisputed trust lands. The present governing body of the Ute Indian Tribe is a six member Tribal Business Committee. Two representatives of each of the three Ute Bands, the White River, the Uintah and the Uncompahgre, are elected to this Committee. In recent tribal election, a total of 430 votes were cast for all candidates. *Uintah Basin Standard*, p. 20, April 17, 1985.

[15] The State of Utah subsequently intervened as a party defendant in 1976 and Uintah County, Utah was joined as a defendant in 1979.

approximately 56,000 acres of land for the Strawberry Reclamation Project by the Act of April 4, 1910 (36 Stat. 269, 285). The court also recognized, as had the parties, that the Tribe's reservation had been enlarged to include the 500,000 acre tract known as the "Hill Creek Extension" under the Act of March 11, 1948 (62 Stat. 72). *Id.* at 1154.

C. Court of Appeals (Panel). On appeal, a panel of the Tenth Circuit unanimously affirmed the lower court's decisions that: (1) the original Uncompahgre Reservation had been disestablished; (2) the original Uintah Reservation had been diminished by the withdrawal of the "Gilsonite Strip" and the land for the Strawberry River Irrigation project; and (3) the Tribe's reservation was later expanded by the Hill Creek Extension. By a divided vote, the panel also affirmed the district court's holding that the original Uintah Reservation had been diminished by the National Forest withdrawal. Reversing the lower court's decision, the panel held that reservation status had also ended with respect to lands within the original Uintah Reservation opened for settlement pursuant to the Act of May 27, 1902, *as amended* (32 Stat. 245, 263). *Ute Indian Tribe v. State of Utah,* 716 F.2d 1298 (10 Cir. 1983).

D. Court of Appeals (*En Banc*). The Tribe petitioned for rehearing *solely* in regard to the status of the former Uintah Reservation lands opened for settlement pursuant to the 1902 Act. After this Court's decision in *Solem v. Bartlett,* 465 U.S. 463 (1984), the court of appeals granted rehearing *en banc*. The Tribe then filed an amended petition to include the status of the original Uncompahgre Reservation and the National Forest withdrawal from the original Uintah Reservation.

The *en banc* court, with two judges dissenting, disagreed with the decision of the panel and, invoking *Solem,* held that both the original Uncompahgre and Uintah Reservations still exist undiminished (except for the 1888 Gilsonite and 1910 Strawberry Reclamation Project with-



drawals).[16] JA 88. The *en banc* majority thus reversed the principal aspects of the district court's decision, which the panel had affirmed, including the lower court's holding that the original Uncompahgre Reservation had been disestablished.[17]

E. The Positions of the United States. The United States participated as *amicus curiae* in the district court and in the court of appeals. Although it supported the Tribe with respect to the status of the original Uintah Reservation, it simply took no position regarding the original Uncompahgre Reservation. Memorandum of the United States as *Amicus Curiae, Ute Indian Tribe v. State of Utah,* 521 F.Supp. 1072 (D. Utah 1981); Brief of the United States as *Amicus Curiae, Ute Indian Tribe v. State of Utah,* 716 F.2d 1298 (10th Cir. 1983). While the case was pending in the district court, however, the Solicitor General informed this Court that since 1897, the federal government had considered the original Uncompahgre Reservation to have been disestablished and that "the historic evidence compels the conclusion that the Uncompahgre Reservation no longer subsists . . ." [18]

*But the United States did not even tell the district court (or the court of appeals) anything about this position. Instead, the United States simply said it took no position on the Uncompahgre issue.* In this respect, the United States left both courts in the dark, until *after* the *en banc* decision resurrected the original boundaries of both reservations. Only then did the United States admit that "no

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[16] Judge Seymour, joined by three other Circuit Judges, wrote a concurring opinion amplifying the court's holding respecting the National Forest withdrawals and the Uncompahgre Reservation JA 102-120.

[17] Judge Doyle, who wrote the *en banc* majority's opinion, was a member of the panel which first heard the case and joined in the panel's decision that the Uncompahgre Reservation had been disestablished.

[18] Memorandum for the Petitioner in Response to the Motion of the Ute Indian Tribe, at 6, *Andrus v. Utah,* 446 U.S. 500 (1980) (No. 78-1522) (September 25, 1979).

position" really meant that the original Uncompahgre Reservation was, in fact, disestablished by the Uncompahgre Acts and that the Uncompahgre documents *compelled* that conclusion:

> In the end, however, the court of appeals' analysis [on Uncompahgre] is *unconvincing*. . . the court of appeals *erred* in holding that the Uncompahgre Reservation was not disestablished. . . ."

Brief for the United States as *Amicus Curiae* at 18, 20, *Utah v. Ute Indian Tribe,* U.S. Supreme Court No. 85-1821 (November 1986) (emphasis added).[10]

The Uncompahgre Acts are clearly *in pari materia* with Uintah Acts, both are public domain acts, specifically cross referenced by Congress time and time again. In fact, by definition, according to the Ute Indian Tribe, the "Uintah and Ouray" Reservation is all the area within the original confines of *both* reservations. The United States should have, in all fairness to all parties and the federal courts, briefed the reasons that compelled disestablishment in one instance, but not the other.

*Moreover, inexplicably, the United States has not said one word about any of this to this Court in this case*—nothing in the Brief for the United States as *Amicus Curiae,* in support of Petition for Certiorari, and nothing in the Brief for the United States as *Amicus Curiae* in support of Petitioner. The United States has maintained, on the other hand, that the same analysis of similar documentation in the same opinion by the same *en banc* majority is essentially sound with respect to the original Uintah Reservation. Brief of the United States as *Amicus Curiae* in Support of Petitioner, *Hagen.* Even the United States cannot explain how the *en banc* majority could, consistent with this Court's precedents, resurrect a two million acre reservation when that reservation ended in 1897, and has not been treated as an Indian Reservation

[10] This is a significant admission because in this Court the United States has previously, without exception, argued against reservation disestablishment. *See,* n.12, *infra.*



by the Department of the Interior or any other federal agency since then (no members of the Ute Tribe even live there). And even the most sophisticated argument cannot cover up the glaring inconsistencies inherent in such a position—especially to the extent that the Uncompahgre Acts are *in pari materia* with the Uintah Acts. *See e.g., Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe,* 473 U.S. 753 (1985). Properly construed, the Uncompahgre disestablishment indicia, all of which were substantially ignored by the *en banc* majority, were also present in the Uintah documents. It should have reinforced the conclusion that the original Uintah Reservation was similarly disestablished. Not fully informed by the United States and blinded by a fundamental misreading of *Solem,* the *en banc* majority missed its usual way in *both* instances. The Utah Supreme Court was not remiss in refusing to follow the same path.

F. The Supreme Court of the State of Utah. It was in this light that the Utah Supreme Court subsequently decided *Hagen/Perank.* JA 15-87. Knowing the *en banc* majority was at least half-wrong in reversing the federal district court (according to what the United States told this Court), only heightened the awareness of the Utah Supreme Court, underscoring the need for a separate and independent evaluation of the disestablishment issue. And even though the Uncompahgre issue was not directly before the Utah Supreme Court, the opinion of the Court explicitly confirms that the Utah Court was very much aware of the most recent views of the United States. JA 19-20.

In *Hagen/Perank,* the Utah Supreme Court carefully examined all of this Court's recent disestablishment cases, and gave proper emphasis to the "restore to the public domain" language which clearly appeared in the operative language of the 1902 Uintah Act. JA 30-39. The offenses in *Hagen/Perank* occurred there, within the original boundaries of the Uintah Reservation and, for the most part, the Utah Supreme Court limited its opinion to this

homesteaded and settled area. In addition, the Court followed the 1902 Uintah Act through the legislative maze, step by step, and determined that Congress never intended to repeal or alter in any significant way this basic congressional understanding. JA 44-62.

The Utah Court did question the reservation status of the one million acre addition to the Uintah National Forest from the original Uintah Reservation, also pursuant to the 1902 Uintah Act. 1905 Proclamation of President Roosevelt, 34 Stat. 3116. JA 69-71. According to the *en banc* majority, this part of the Uintah National Forest is now also within the Uintah Reservation (the district court and the panel agreed it was not). JA 75, n. 28. (Until 1977, the United States Department of Agriculture, Forest Service, agreed with the district court and the panel. See *Amici* Counties Brief in Support of Petition, App. B at 25a-29a).

As a result, the Utah Supreme Court did not have occasion to really address the *Uncompahgre* issue. Nevertheless, for the reasons noted *supra*, a limited review of the Uncompahgre documentation is both appropriate and informative, even if the area itself is not directly at issue here.[20]

## II. THE UNCOMPAHGRE AND UINTAH DOCUMENTATION CONFIRMS DISESTABLISHMENT.

A. The Uncompahgre Documentation. The original Uncompahgre Reservation, created by Executive Order of January 5, 1882 (I Kappler 901) (LD 12), encompassed more than 1.9 million acres, nearly all of which is in Uintah County. In the Act of August 15, 1894, ch. 20, 28 Stat. 286, 337-338 (LD 35), App. 72a-73a. Congress directed that when a Presidential commission determined which lands would remain after allotments to the Uncompahgre Indians, those unallotted lands "shall,

[20] The *en banc* majority reestablished the original boundaries of both reservations.



by proclamation, be restored to the public domain. . . ." [21] Three years later, pursuant to the Act of June 7, 1897 (30 Stat. 62, 87) (LD 49), App. 186a, implementing the 1894 Act, approximately 12,500 acres within this area (or less than 1 percent of the original Uncompahgre Reservation) were allotted, while the remaining lands were thereafter treated as "restored to the public domain," as the Commissioner of Indian Affairs stated.[22]

There was a clear continuity of purpose between the 1894 Act containing operative public domain language, App. 72a, and the 1897 Act, which mandated the opening of the original Uncompahgre Reservation, App. 186a. *See* JA 136-137. The legislative history of the 1897 Act shows that the purpose of this provision was to carry forth and implement the 1894 Act. App. 153a-158a. It shows as well that the purpose remained disestablishment. App. 161a-162a. The *en banc* majority did not explain how, in the face of this legislative history, Congress could have intended the original Uncompahgre Reservation to remain intact. More than that, the *en banc* majority failed even to discuss the matter. (*See* JA 97-103). And so did the United States.

The record also shows that, after the opening in 1898, there was "a widely held, contemporaneous understanding." (*Solem*, 465 U.S. at 471), that the Uncompahgre Reservation had been disestablished. Again, the *en banc* majority does not discuss the fact that officials of the Department of the Interior immediately began to refer to and treat the area as the "former" or "late" reserva-

[21] *Importantly*, the same Act directed the commission to:

> Also negotiate and treat with the Indians properly residing upon the *Uintah* Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians.

App. 72a (emphasis added). *See, in pari materia* argument.

[22] *E.g.*, [1899] Commissioner of Indian Aff. Rept. at 543 (JX 117); [1911] Commissioner of Indian Aff. Rept. at 92 (JX 353).

tion.[23] The record also reveals a firm understanding that the unallotted lands were "restored to the public domain." [24] Because these materials contain unambiguous expressions of disestablishment by government officials responsible for implementing federal Indian policy, they constitute authoritative, contemporaneous statements reflecting the intent of Congress. *See, e.g., Rosebud,* 430 U.S. at 602-03.

Moreover, the *en banc* majority failed to take into account contemporaneous legislation treating the original Uncompahgre Reservation as having ended. The Act of March 1, 1899 (LD 61), for example, described the area as the "former Uncompahgre Indian Reservation." 30 Stat. 940. Because this provision was passed by the same Congress which enacted the 1897 Act (*viz.,* the 55th Congress), it constitutes compelling evidence of a congressional intent to disestablish. *See Rosebud,* 430 U.S. at 603 n.25 (significance attributed to similar legislation passed shortly after the subject act "by the same Congress. . .").

Finally, the *en banc* majority said nothing about the unwavering position of the Department of the Interior since 1897 that the original Uncompahgre Reservation no

[23] *See, e.g.,* [1898] Commissioner of Indian Aff. Rept. at 43 (JX 108); [1899] Commissioner of Indian Aff. Rept. at 43, 351-52 (JX 117); Letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated April 12, 1899 (JX 113); H.R. Doc. No. 33, 58h Cong., 1st Sess., at 1, 2 (1903) (letters of the Secretary and Commissioner); Letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated July 27, 1903 (JX 168).

[24] [1899] Commissioner of Indian Aff. Rept. at 543 (JX 117); (Acres reserved for 83 allottees, remainder of reservation *restored to the public domain, Act of June 7, 1897*); [1900] Commissioner of Indian Aff. Rept. at 615 (JX 123) (Acres reserved for 83 allottees, remainder of reservation *restored to the public domain, Act of June 7, 1897*); [1901] Commissioner of Indian Aff. Rept. at 669 (JX 154) (Acres reserved for 83 allottees, remainder of reservation *restored to the public domain, Act of June 7, 1897*); [1904] Commissioner of Indian Aff. Rept. at 564 (JX 198) (Acres reserved for 83 allottees, remainder of reservation *restored to the public domain, Act of June 7, 1897*) (emphasis added).



longer exists, a position the United States later confirmed in this Court, as noted *supra.* Nor did the *en banc* majority opinion address the 1948 Act (62 Stat. 72) (LD 187)—the Hill Creek Extension—extending what was then the Tribe's existing Reservation to include lands situated within the original Uncompahgre Reservation, which, in the words of the Solicitor General, would have constituted "a futile act if the latter Reservation still subsisted. . . ." Federal Government Memorandum in *Andrus v. Utah, supra,* at 5.[25] In the 1948 Act itself, Congress once more referred to the historic Uncompahgre Reservation in the past tense, that is, as the "former" reservation. 62 Stat. 77 (§ 2). Moreover, "nothing since 1948 indicates any Congressional change of mind. . ." Federal Government Memorandum in *Andrus v. Utah, supra,* at 5, Brief of the United States as *Amicus Curiae, State of Utah.*

Given its constancy, this long-standing administrative and congressional treatment was entitled to considerable weight. But there it was given none, contrary to *Rosebud's* instruction that:

> the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as part of the "jurisdictional history."

430 U.S. at 604.

As to this part of the region—the original Uncompahgre Reservation—the *en banc* majority thus contradicted the federal government's position, taken in this Court, that the reservation ended in 1897, and has not been treated as an Indian reservation by the Department of the Interior or any other federal agency since then. Indeed, the Uncompahgre Utes, in 1965 alleging that they had "lost the reservation," recovered money dam-

[25] The concurring opinion at least acknowledges that the 1948 Act seems "irreconcilable with continued reservation status." JA 115.

ages against the United States, as the government told this Court. Brief of the United States as *Amicus Curiae, Ute Indian Tribe v. State of Utah,* U.S. Supreme Court No. 85-1821, November 1986. See Petition, at p. 7, in *Ute Indian Tribe v. United States,* 14 Ind. Cl. Comm. 707 (1965) (that the Uncompahgre Band of Utes "have lost the reservation set aside for their use," that the federal government "refused to provide any reservation for said Indians," and that the government did not maintain the original "Uncompahgre Reservation in Utah as a reservation").

In *Andrus v. Utah,* 446 U.S. 500 (1980), the Ute Tribe had moved to intervene on the basis that the lands involved were within the original Uncompahgre Reservation and that this reservation had not been disestablished. The Solicitor General opposed the Tribe's intervention on the basis that:

> The fact is that, for several decades at least, the Department of the Interior has considered the Uncompahgre Reservation as disestablished. That remains its view today. Our own review of the evidence affords no basis for disagreeing with that conclusion. . .

Federal Government Memorandum in *Andrus v. Utah,* at 6.

Among other factors, the Solicitor General pointed out that "Congress treated the Uncompahgre Reservation as a mere temporary asylum for the Ute Band of that name," "in 1965, the Ute Tribe obtained a stipulated judgment in the Indian Claims Commission to compensate it for the failure of the United States to provide the Uncompahgre Band with a permanent Reservation (*Ute Indian Tribe of the Uintah and Ouray Reservation v. United States,* 14 Ind. Cl. Comm. 707)," and "at no time since 1897 does it appear that the Department of the Interior (or any other government agency) has treated the Reservation as still in existence." *Id.* at 4-5. Moreover, the Solicitor General informed this Court that "the historic evidence *compels* the conclusion that the Uncompahgre



Reservation no longer subsists." *Id.* at 5 (emphasis added).

There is more. The *United States* answered the Tribe's petition in the Indian Claims Commission by stating that with respect to the original Uncompahgre Reservation—which the Tribe itself alleged had been disestablished—the Tribe "suffered no loss by the *restoration to the public domain* . . . of the unallotted lands within the area. . . ." Answer of the United States, at p. 17 (March 9, 1954), in *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States,* No. 349, 14 Ind. Cl. Comm. 707 (1965) (emphasis added). Assuming the public domain provision of the 1894 Act was implemented by the 1897 Act, the *en banc* majority's point instead was that *Solem* altered the settled rule that such language constituted a clear and unequivocal expression of disestablishment. It is on that point that the *en banc* majority erred and rendered a decision in conflict with the decisions of this Court, the lower federal courts, and the Utah Supreme Court. *Moreover, it is readily apparent that this fundamental misconception distorted the perspective from which the Uintah documents should have been viewed.*

B. The Uintah Documentation. The Brief of Respondent State of Utah sets forth in a concise manner the general arguments that clearly demonstrate that the Utah Supreme Court was correct in its analysis of the Uintah Act, as amended, and in its conclusion—and there is no need to repeat them here. Brief of Resp. at 13-34. A brief summary of some of the more specific Uintah references in support of this conclusion, however, presents the issue in the proper historical perspective. It also reinforces the position that had the *en banc* majority been fully informed by the United States and not been so blinded by misreading *Solem,* it could not have ignored the combined weight of Uintah documentation. The opinion of the district court, *Ute Indian Tribe v. State of Utah,* 521 F. Supp. 1072, 1111-1150 (D. Utah 1981), the panel of the court of appeals, *Ute Indian Tribe v.*

*State of Utah*, 716 F 2d 1298, 1307-1313 (10th Cir. 1983), and the dissenting *en banc* opinion of Judge Seth at 773 F.2d at 1108-1114, JA 120-158, also recount and reflect this perspective. And nothing in *Solem* or any other opinion of this Court even suggests that it could be so easily discounted, as the *en banc* majority incorrectly assumed.

We start, without argument, with the general proposition, as stated in H.R. Rep. No. 791, 50th Cong., 1st Sess. (1888) (LD 15) App. 1a: "[t]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it. . . ." *Id.* at 4a-5a: *See e.g.*, T. Donaldson, *The Public Domain, Its History, with Statistics* (1884) 240-248. Congress passed the Uintah Act of May 27, 1902, 32 Stat. 245 (LD 82), JA 159-160, with this operative public domain language expressly stated. And prior to the passage of the 1903 Uintah Act, JA 163-165, an amendment was proposed to the appropriations bill which provided money for the resurveying of portions of the southern and western boundaries of the Uintah Indian Reservation. App. 200a. Congressman Sutherland of Utah, later to become United States Supreme Court Justice Sutherland, objected to the amendment on the basis that it would *not* serve any useful purpose. In taking this stance, Congressman Sutherland made the following remarks:

> If the Uintah Reservation is opened, which I believe it will be, this appropriation . . . for reestablishing the boundary lines of the reservation *is entirely useless*. The boundary lines have been in their present condition for many years, and if by any mischance the reservation should not be opened it will not hurt to let it wait for another year; and if the reservation is opened it is simply an appropriation . . . *without any useful purpose whatever*. . .

App. 204a (emphasis added).



Moreover, the Congressman also stated that "[t]he reservation will be *simply restored to the public domain*." *Id.* (emphasis added). The effect that the 1902 Act was intended to have on the boundaries of the Uintah Reservation was neither questioned nor disputed; in fact, the amendment which was the focus of Congressman Sutherland's remarks was apparently rejected on that basis. *See id.*

By letter dated April 27, 1903 (App. 243a-247a), the then Acting Commissioner of Indian Affairs directed United States Inspector James McLaughlin to go to Utah, explain the legislation to the Ute Tribe and obtain the consent of the Uintah and White River Utes to the allotment of their lands.[26] The instructions contained in that letter made clear that allotments were to be made and that the unallotted lands were to be restored to the public domain. *Id.* at 244a-245a. Moreover, the opening of the surplus lands for public entry and settlement was characterized as a "restoration to the public domain." *Id.*

Conferences with the Utes were conducted by Inspector McLaughlin from May 18 to May 23, 1903. *See* Minutes of Councils with Uintah and White River Indians at 34 (1903) (JX 162), App. 333a-407a, (hereafter Transcript). Significantly, as the Utah Supreme Court noted, the Inspector pointed out:

> [E]ach of you will have a *boundary* to your individual holdings and there will also be a *border* to that 250,000 acre tract set aside for pasturage. . . . You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year there will be *no outside boundary line to this reservation*.

App. 368a (emphasis added).

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[26] James McLaughlin was the same United States Indian Inspector who conducted the 1901 and later negotiations with the Rosebud Indians involved in *Rosebud Sioux Tribe v. Kneip, supra*, 430 U.S. at 590, 606-07, & 610.

The transcript also attests that the tribal members were well informed and understood the point exactly, even though they did not like the result described. *See, e.g.*, App. 339a-341a, 344a-351a, 358a, 359a-360a, 365a-367a, 371a, 374a, 378a-382a. For example, in the Council held on May 20, 1903, Wapsoch, a Uintah Ute, stated "[w]e do not want this *reservation line* changed in any way." App. 346a (emphasis added). Later, in the same Council, Red Cap, a White River Ute, confirmed this understanding:

> The Indians have understood what they have heard, and they hold this reservation, and they do not want any of it cut off. We want this *reservation line* to be just as it is. I hold it for my children, and I don't want to part with it. I have heard talk about selling before. . .

App. 349a (emphasis added).

And, in the Council held on May 22, 1903, Parank stated as follows:

> The Indians are talking about this *reservation line* that has been put here for a long time, and they cannot understand why it is thrown aside. It was put down a long time ago. . . . Now they are trying to *throw it aside*. . . .

App. 381a (emphasis added).

After Inspector McLaughlin completed his report, Congress revisited the issue more than once because of delays in surveys and allotments. Mindful of the congressional authority confirmed by the Court in *Lone Wolf*, the public domain references were again consistent and unequivocal. Several examples include:

> Hereby provided that so much of said lands as will be *restored to the public domain* shall be open to settlement and entry by proclamation of the President. . . And further provided, that for one year immediately following *the restoration of said lands to the public domain* said lands. . .

App. 286a-287a (emphasis added).



> *Provided*, That so much of said lands as *will be under* the provision of said acts *restored to the public domain* shall be open to settlement and entry by proclamation of the President. . .

App. 285a (emphasis added).

> Representative Sherman. "[T]he amendment undertakes to do this: To *restore* this [the lands to be opened for settlement] to the *public domain* on the 10th of March. . . ."

App. 304a (emphasis added).

> As the manner of opening Indian reservations to entry and settlement *after the lands are restored to the public domain* is a matter that comes within the jurisdiction of the General Land Office. . .

App. 279a-280a, letter of the Commissioner of Indian Affairs contained in that Report (emphasis added).

The Utah Supreme Court recognized minor changes in the final Uintah amendments were not intended or understood to alter this basic proposition as it related to reservation disestablishment. JA 41-57. As the Utah Supreme Court explained, the 1905 congressional debate also addressed the "manner of such opening," *Perank*, JA 55-56. Because Congress could not have considered the issue in an historical vacuum, one would expect some congressional reference to precedent—and here the precedent cited was the 1904 *Rosebud* legislation (the same Act that the *Rosebud* court held reflected the baseline purpose of *disestablishment* in the *Rosebud* legislation). *Rosebud*, 430 U.S. at 592-603.

> The provisions of this [Uintah] bill (Senate Bill 6867) prescribing the manner in which the lands are to be opened are similar to the provisions under which the *Rosebud Indian Reservation* in South Dakota, . . . .

S. Rep. 4240, 58th Cong. 3d Sess., 15-16 (1905) (LD 102) App. 281a-282a (emphasis added).

> Representative Sherman, The idea being to have such rules and regulations as were prescribed, for instance, in the *Rosebud* Reservation opening. . . .

39 Cong. Rec. 1181 (1905) (LD 103) App. 286a (emphasis added). Other sources confirm this justifiable expectation:

> As stated by Hon. W. A. Edwards, Commissioner General of the United States Land Office at Washington, D.C., it is quite certain that regulations similar to those governing the opening of the *Rosebud Reservation* in Dakota last year, will obtain at the opening of the Uintah Reservation in this state. . . .

Deseret Evening News, July 8, 1905, at 5 (JX 282) (emphasis added).

> Senator Smoot was pleased with the provisions of the reservation bill, . . . . The manner of opening the reservation will no doubt be the same as that employed at the *Rosebud reservation*. . . .

Deseret Semi-Weekly News, March 20, 1905, at 2, (JX 236) (emphasis added).

> The opening to settlement and entry under the homestead law of the *Rosebud Indian lands* . . . was successfully accomplished, . . . *Equally* successful was the opening to settlement and entry under the homestead laws on August 28, 1905, of the unreserved and unallotted lands of the Uintah Indian Reservation in Utah, . . . .

Report of the Secretary of the Interior (1905) at 1495 (JX 328) (emphasis added).

> A *precedent* for the proposed [Uintah] legislation will be found in the granting of a similar privilege by the last Congress to homestead settlers upon certain lands which were *formerly* a part of the *Rosebud Indian Reservation*. . . .

S. Rep. 139, 59th Cong. 1st Sess. 2 (1906) (LD 117) (emphasis added).

> A *precedent* for the proposed [Uintah] legislation will be found in the granting of a similar privilege by the last Congress to homestead settlers upon certain lands which were *formerly* a part of the *Rosebud Indian Reservation*. . . .



H.R. Rep. 291, 59th Cong. 1st Sess. 2 (1906) (LD 199) (emphasis added).

A comprehensive thesis by the author of the study that figured prominently in the *Solem* opinion (*Solem*, 465 U.S. at 466 n.5, 477 n.21, 479 nn. 22 & 23, 480 nn. 24 & 25), expressly recognized that the Utah Uintah Act and others "followed the model" of the 1904 *Rosebud* Act. F. Hoxie, *Beyond Savagery: The Campaign to Assimilate The American Indians, 1880-1920* at 390 (Univ. Microfilms 1977).

The Proclamation of President Roosevelt, dated July 14, 1905, confirms that the Utah Supreme Court was correct. JA 176-177 (emphasis added). JA 57-60. See Brief for Respondent State of Utah at 28-31.

More than that, one year later, when President Roosevelt made an adjustment to compensate for an erroneous homestead entry on reserved lands, he expressly set forth in a 1906 Proclamation that the tract in question was then (1906) in the "*former* Uintah Indian Reservation in Utah" and it too was promptly and *appropriately "restored to the public domain,"* as the Utah Supreme Court aptly pointed out (emphasis added). JA 60-61.

And this same understanding is repeatedly confirmed in nearly every source, time and time again, throughout the entire record of the subsequent history of both original reservations. Nothing in the briefs or records in *Seymour, Mattz, DeCoteau, Rosebud,* or *Solem* even approaches the consistency and force of this documentation. Pages of representative excerpts are set forth in App. 408-429a.

This documentation reflects, in a variety of ways, precisely what the Commissioner of Indian Affairs at the time noted in his 1905 Annual Report when he described "the sale of the Ute lands *restored to the public domain*". [1905] Commissioner of Indian Aff. Rep. at 147 (JX 323) (emphasis added). The following year, the Commissioner repeated the point in a letter to the Secretary of the Interior that the lands were "*restored to the public*

*domain*" and that these lands were "*former reservation lands.*" 40 Cong. Rec. 3405 (1906) (emphasis added). As early as 1906, the State of Utah formally reached this same conclusion. In a 1906 opinion of the Utah Attorney General quoted in the March 31, 1906 edition of the *Vernal Express*, Vernal, Uintah County, Utah, the Attorney General concluded that the 1864 Uintah Reservation was no longer an existing reservation because it had become "*a part of the public domain*" and referred to it as a "*former*" Indian reservation. Appellees' Opening Brief, Add. F, *Ute Indian Tribe*, 716 F.2d 1298 (10th Cir. 1983) (emphasis added).

A decade later, the description was still the same. In a Report submitted to Congress in 1914 respecting the water rights of the Indians within the original Uintah Reservation, H.R. Doc. No. 1250, 63d Cong. 3d Sess. (September 9, 1914) (LD 149), the Secretary of the Interior stated that the surplus lands of that Reservation "*were restored to the public domain*: . . ." and described the Uintah Reservation as the "*former*" Reservation. *Id.* at 2, 5 (emphasis added).

There is no question that this construction confirmed that the land was not within the boundaries of the original Uintah Reservation. The Governor of the State of Utah, as early as 1917, by Proclamation officially described County *boundaries* by references to the "boundary of the former Uintah Indian Reservation." Utah Code Ann. §§ 17-1-10, 17-1-27. In a letter to the Secretary of the Interior dated June 19, 1941 (JX 450), respecting the undisposed surplus lands of the original Reservation, the Commissioner of Indian Affairs described these lands as "lying within the *former boundaries* of the Uintah and Ouray Indian Reservation . . . which lands were opened to entry under the Act of May 27, 1902. . ., as amended." *Id.* at 1 (emphasis added). Later in a published Opinion of the Solicitor of the Department of the Interior dated January 27, 1947, 59 I.D. 393 (JX 454), it was noted: "Allotments were made. . ., and the balance of the lands [of the Reservation], with exceptions



not here material, *were restored to the public domain* pursuant to the Act of May 27, 1902, as amended . . ." *Id.* at 393 (emphasis added).

Until recently, not even the Ute Tribe disagreed with this conclusion. In fact, in 1957, the Ute Tribe and the United States so stated in related litigation in the Court of Claims, *Uintah and White River Bands of Ute Indians v. United States*, 139 Ct. Cl. 1 (1957). There, as the Utah Supreme Court stressed, they entered into a Stipulation, with which the Court of Claims agreed (139 Ct. Cl. at 5-6, 22), quoted the 1902 Act and then succinctly stated the critical point:

> "Pursuant to this [1902] Act and amendments thereto, more fully set out hereafter, allotments in severalty, aggregating 39,349.84 acres by 1905, were made to the Uintah and White River Indians, and surplus lands (with the exception of the forest reserve and reclamation withdrawals and certain mineral entries) *were restored to the public domain*, and opened for disposition under the public land laws for the benefit of the Indians."

*See*, Counties *Amici* Brief in Support of Petition at 1a-24 (emphasis added). JA 68.

What is more, the United States (and the Ute Tribe) consistently and repeatedly maintained the original Uintah Reservation was a "*former*" reservation (Counties *Amici* Brief App. A, at pp. 15a, 16a, 18a, 23a); and throughout its opinion and findings, the Court of Claims also treated the original Uintah Reservation as having ended. *E.g.*, 139 Ct. Cl. at 2, 25, 28, 56, 64, 69, 70.

This explains why, until recently, the Ute Tribe itself treated only the trust lands as the Tribe's post-1905 reservation.[27] The Utah Supreme Court quoted with approval

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[27] *See e.g.*, 1957 Ute Ten-Year Development Program, at 66-68 (JX 465); 1966 Review and Revision of the Uintah & Ouray Indian Reservation-Wide Program, at 7, 8; 1969 Annual Report of the Uintah Indian Tribe, at 1 (JX 473).

the manner in which the panel of the court of appeals relied on this acknowledgment. JA 69.

Thus, for more than half a century the lands "constituting" the Tribe's reservation were considered to be only those lands held in trust, as this Court itself recognized in *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 141 (1972), in a different context.

Finally, in other decisions rendered in prior litigation, other courts routinely interpreted the 1902 Act, as amended, in a manner that supports all of the points noted above.[28] Indeed, in 1946, the Tenth Circuit expressly held in *Hanson v. United States,* 153 F.2d 162 (10th Cir. 1946)—a decision unaccountably ignored by the *en banc* majority (but not by the Utah Supreme Court)—that the unallotted and unreserved lands of the original Uintah Reservation were "*restored to the public domain by the Act of May 27, 1902. . . .*" *Id.* at 163 (emphasis added). JA 72. If the *en banc* majority had not misread *Solem,* these points should have been relied on to support the same conclusions.

### III. *SOLEM v. BARTLETT,* 465 U.S. 463 (1984), ATTESTS THAT THIS COURT HAS CONSISTENTLY RECOGNIZED THE IMPORTANCE OF OPERATIVE PUBLIC DOMAIN TERMINOLOGY.

The crux of the *Solem* analysis begins with the most essential principles the Court readily recognized from established precedent. *Solem* at 470-472. In terms of operative language, or "statutory language used to open" the areas, according to *Solem,* explicit reference to "cession" or "other language" figured foremost in these established principles, "strongly suggesting" disestablishment. *Solem* at 470. Accordingly, the Court set forth these specific examples first:

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[28] *See Hanson v. United States,* 153 F.2d, at 162-63; *Uintah and White River Bands of Ute Indians,* 139 Ct.Cl., at 5-6 & 21-22; *United States v. Boss,* 160 F. 132, 132-33 (D. Utah 1906); *Sowards v. Meagher,* 108 P. 1112, 1114 (Utah 1910).



> The most probative evidence of congressional intent is the *statutory language used to open* the Indian lands. Explicit reference to cession *or other language* evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. *DeCoteau v. District County Court, supra,* at 444-445; *Seymour v. Superintendent, supra,* at 355.

*Solem* at 470 (emphasis added).

As one would expect, both cases, as specifically cited by the Court for these two primary examples, *DeCoteau* and *Seymour,* unequivocally support the analysis. "*DeCoteau* at 444-445" specifically recounts the significance of cession terminology in reservation disestablishment and "*Seymour* at 355" *specifically* recounts the significance of public domain terminology in reservation disestablishment, in the discussion of the same 1892 *Colville* public domain statute consistently cited by everyone, including Justice Marshall, for this proposition. *Seymour* at 355; *Mattz at* 504, n.22; *DeCoteau* at 463 (Douglas, J., dissenting); *Rosebud* at 618 (Marshall, J., dissenting); *Solem* at 470. In fact, in this *Solem* citation, Justice Marshall not only adhered to his *Rosebud* dissent in recognizing "public domain" as "express language" of disestablishment, he also specifically cited the *same* statute he relied upon there. *Rosebud* at 618, n.3 (Marshall, J., dissenting).

Moreover, *Solem,* in the very next sentence, explains that when such language of cession is buttressed by "an unconditional commitment from Congress to compensate" that strong suggestion of disestablishment is transformed into an almost "insurmountable presumption." *Id.* at 470-471.

In other words, the method of compensation cannot detract from the strong suggestion of disestablishment in either instance. It can create an insurmountable presumption in favor of cession disestablishment.

Public domain language is therefore "the other language" that *Solem* sets forth, by *express* citation, in this section of the opinion addressed to operative language, "language used to open" reservations. And public domain strongly suggests disestablishment irrespective of the method of compensation.

Having said this, the *Solem* court then examined the "operative language" of the *Solem* Act, which did not contain either cession or public domain terminology. *Solem* at 472. After concluding the review of the operative language, the Court addressed the "balance of the Cheyenne River Act" which it found to be "largely consistent with" continued reservation status. *Solem* at 474-475. In this process, the Court noted that the "case" was, in fact, "made more difficult" by language (in the balance of the act) that "indirectly" supported disestablishment. *Solem* at 474-475. While the Court acknowledged that even an isolated reference to public domain was "undisputedly" evidence of disestablishment," "when *balanced against* the Cheyenne River's stated and limited goal" such isolated references could not "carry the burden of establishing an express Congressional purpose to diminish." It was in this "balance" of the Act analysis and in this context that *Solem,* in a footnote simply stated:

> Similarly, even without diminishment, unallotted opened lands could be conceived of as being in the "public domain" inasmuch as they were available for settlement.

*Solem* at 475.

The fundamental error of the United States, Petitioner and supporting *Amici* (as well as the en banc majority of the Court of Appeals,) is that they did not assess *Solem* in this light.

## CONCLUSION

The judgment of the Utah Supreme Court should be affirmed.



Respectfully submitted,

HERBERT WM. GILLESPIE
Duchesne County Attorney
P.O. Box 206
Duchesne, UT 84021
(801) 738-2435

JESSE C. TRENTADUE
*Counsel of Record*
SUITTER, AXLAND & HANSON
175 South West Temple
Salt Lake City, UT 84101
(801) 532-7300

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# APPENDIX

# APPENDIX

**H.R. Rep. No. 791, 50th Cong., 1st Sess. (1888) (LD 15)**

HOUSE OF REPRESENTATIVES

50th Congress, 1st Session — Report No. 791

## UINTAH VALLEY INDIAN RESERVATION

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MARCH 1, 1888.—Referred to the House Calendar and ordered to be printed.

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Mr. COBB, from the Committee on Indians Affairs, submitted the following

## REPORT:

[To accompany bill H. R. 7936]

*The Committee on Indian Affairs, to whom was referred "a bill to restore to the public domain a part of the Uintah Valley Indian Reservation, in the Territory of Utah, and for other purposes" (H. R. 1984), report as follows:*

There was established, by proclamation of President Lincoln, in Utah Territory on the 3d day of October, 1861, an Indian reservation known as the Uintah Valley (see Executive orders relating to Indian reservations, extract Commissioner's report 1866, pages 358 and 359), described in the general terms as the Valley of the Uintah River, in said Territory.

By act of Congress approved May 5, 1864 (13 Stats. at Large, page 63), other Indian reservations in said

Territory were discontinued, directed to be sold in 80-acre tracts to the highest bidder, and by section 2 the Uintah Valley was set apart for the use of the Indians, and an appropriation made for the purpose of making agricultural improvements on the same for the benefit of the Indians.

Another act was pased June 18, 1878 (20 Stats. at Large, page 165), repealing the clause of the act of May 5 directing the discontinued reservations to be sold to the highest bidder, and directing the Secretary of the Interior to restore them to the public domain to be disposed of under the public-land laws.

The Interior Department had the Uintah Valley Reservation surveyed; the eastern boundary line was run by one Dubois, and is known as the Dubois line.

In 1885 this line, as well as the township lines bordering on the reservation, were, through lapse of time and other natural causes, completely lost, so that the citizens living in the neighborhood, the military officers at Fort Duchesne, and the surveyor-general of the Territory, by his deputies, were unable to know or find its exact location. No marks, corners, or stations were left to indicate where they were.

About this time certain citizens of the Territory, in prospecting for mines, found veins of "Gelsonite," which is the mineral from which "asphaltum" is deduced or manufactured, and the total supply for which in this country is brought from abroad in the vicinity of the Dead Sea, and, in good faith, believing their discovery upon the public domain, applied to the proper officers of the Government to locate the same, as provided for in the mining laws of the United States and said Territory.

The surveyor-general sent his deputy upon the ground, and, ignorant of the fact that the veins were on the reservation, he surveyed the same, and the parties proceeded



with their steps to get title and to open their mines. They were in about three miles of Fort Duchesne, and were not molested by the military in charge, whose duty it was to put them off the reservation; nor by the Indian agents in charge, because every one believed, as they did, that they were upon the public domain.

They opened up their property, and spent between $25,000 and $30,000 upon it and in opening a road across the reservation to the railroad to carry their product to market.

In 1887 Congress authorized the Utah and Midland Railroad to cross the reservation, and in making the survey for the same some of the corners of the Dubois and neighboring township lines had to be found, and a rumor was put afloat that these deposits were probably inside the Indian reservation, which rumors reached the locators, and they immediately employed the most skillful surveyor to re-run and mark the necessary lines, which was done with the utmost difficulty and expense and after months of hard labor, but, when completed, revealed the fact that the veins were about 1,000 feet inside the reservation.

Inasmuch as these deposits are the only known deposits of this mineral in the United States, and a new industry was developed by their discovery, it is deemed advisable to restore to the public domain a small portion of the reservation on which the veins are located. This action has been recommended by the present governor of the Territory, in the interest of the general public as promoting the general welfare. His views are concurred in by other prominent citizens of the Territory.

From a letter of the Commissioner of Indian Affairs, transmitted by the Secretary of the Interior, we find that the whole number of Indians on said reservation is about 900, and of this number the male adults are, of Uintah Utes, 123; White River Utes, 110, or 233 in all; that the number of acres of said reservation is 2,039,040, which

would give 8,708 acres to each male adult over eighteen years of age; that the amount asked to be restored to the public domain, and which is situated in a corner of the reservation adjoining the public domain, is 7,040, a very small and insignificant part of this great reservation; that the part asked to be restored is a sandstone desert, uninhabited, unfit for agricultural or grazing purposes, and unused by the Indians for any purpose. The affidavits of the five military officers at Fort Duchesne show also that it is utterly worthless for any purpose to the tribes.

In speaking of the propriety of restoring it, the Commissioner of Indian Affairs says:

> As to the propriety of passing such a bill, I would say that if the Indians do not make any use of the lands and are not likely to for any purpose, and are perfectly willing for it to be cut off and opened to the use, occupancy, and benefit otherwise of the whites, I do not know there would be any serious objection to the segregation of the tract in question.

While the Commissioner does not recommend it, he sees no objection if the conditions he states exist, and in his views the Secretary concurs. We find they do exist, and see no reason why it should not be restored, as it is of no value to and is not used by the Indians, and will add greatly to the wealth and prosperity of the Territory and of the country.

The location is peculiarly favorable to restoration, as the Indians live upon the rich and fertitle valleys of the Uintah River and its tributaries, and seldom, if ever, cross this small corner. Fort Duchesne lies between them and the deposits, and we believe, as the Commissioner says, that the liability to controversy with the whites will not be increased by its restoration.

The policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing popu-



lation required it. In doing so it has equitably cared for the Indians, who held a quasi title to the land, and for such settlers who in good faith had improved and were occupying any portion thereof, believing it to be the public domain. We append the letter of Hon. S. M. Stockslager, Acting Commissioner of the General Land Office, and refer to it for further information on this subject.

The roads built by these parties across the reservation and the furnishing of mineral as return freight to the railroad will enable the Government to get its Army and Indian supplies upon the reservation at greatly-reduced costs.

Believing, therefore, that it is to the best interests of the Government, the Territory, and the Indians that this small tract of land, valuable alone for the mineral deposit, should be restored, we report a bill for that purpose. Believing that the parties who discovered these deposits and attempted to locate acted in good faith, they should be given, as is customary in the restoration of all reserved lands, priority for their claims. We have so provided in the bill. We also have provided that whatever is realized from the disposition of the lands shall be paid into the trust fund established for the Indians, so they will be more than equitably compensated for their loss. As there were some errors in the bill submitted, we report the accompanying bill upon the subject, and recommend its passage.

**Excerpts from 19 Cong. Rec. (1888) (LD 16)**

CONGRESSIONAL RECORD—HOUSE
MARCH 10

[192] UINTAH VALLEY INDIAN RESERVATION

Mr. PEEL. I call up for consideration the bill (H. R. 7936) to restore to the public domain a part of the Uintah Valley Indian reservation, in the Territory of Utah, and for other purposes.

The bill was read, as follows:

*Be it enacted, etc.*, That so much of the Uintah Valley Indian reservation, in the Territory of Utah, established by proclamation of the President, of date October 3, 1861, as lies within the following boundary, namely: Beginning at mile-post numbered 19, Du Bois's survey, from the initial point established in township 8 south, range 20 east, Salt Lake meridian; thence southerly to the northeast corner of township 2 south, range 1 east, Uintah special meridian; thence south along the east boundary of township 2 south, range 1 east, Uintah special meridian, to the southeast corner of township 2 south, range 1 east, Uintah special meridian; thence east along the north boundary of township 3 south, range 2 east, Uintah special meridian, to its intersection with the east boundary of the Uintah Indian reservation, thence in a northwest direction with the eastern boundary line of said reservation to the beginning, be, and the same is hereby, declared to be public lands of the United States and restored to the public domain.

SEC. 2. That said lands shall be disposed of as other public lands of like kind in accordance with existing laws (except the homestead law shall not apply), and for not less than $1.25 per acre, and not otherwise than for cash entries; *Provided*, That



any location, entry, or entries, mineral or non-mineral, heretofore made or attempted to be made on said lands, or any part thereof, by any qualified person, shall bear date and be allowed the same as if said lands had been public lands at the time of said attempted location or institution of said proceedings, but said mineral entries shall not be completed except upon the payment of $20 an acre, or at that rate for the amount taken up by the claim: *And provided further*, That all moneys arising from the sales of this land shall belong to said Indians and be paid into the Treasury of the United States and held or added to any trust funds of said tribes now there.

SEC. 3. That the Secretary of the Interior shall submit this act to the adult male Indians on said reservation, and the restoration shall take effect on a ratification by three-fourths thereof.

* * * *

Mr. HOLMAN. Mr. Speaker, this bill contains unusual provisions in regard to the disposal of this 7,000 acres of land. The copies of the bill have been exhausted, I understand, and I am not able to speak with certainty as to the exact number of acres and have to rely upon memory for that; but I understood that the total reservation embraces some two and a quarter million of acres.

Mr. PEEL. But this only relates to 7,040 acres.

Mr. HOLMAN. I am aware of that; but I am speaking of the whole of this reservation. Of that reservation this strip embracing 7,040 acres is affected by the present bill.

Now, this bill is for the benefit of the miners, who, in violation of law, have taken possession of that strip of land for mining purposes; and the statement is made that the land is not valuable for agriculture—the Indians occupying the valleys and streams within the remaininder of the reservation. I think in such a case as this, notwith-

standing the rapidity with which we are exhausting the reservations, for already during this session we have withdrawn from reservations lands to the extent of 29,000,000 of acres in the two reservations which have been before the House; but in this case, where the lands are really valueless except for mining purposes, it seems to me there is some justice in the line of policy adopted. But surely in such case the people who have trespassed upon the lands and found them valuable ought to pay for their value.

Mr. PEEL. They are required to pay $20 an acre.

Mr. HOLMAN. When it comes to the matter of agricultural lands the case seems to be different, for there the high public policy of securing homes for the people must be considered in connection with the established rights of the Indians, and where it can be done without injustice it seems to me that these lands ought to be brought within the reach of that rapidly increasing body of our people who are without homes. Here, however, we are not embarrassed by anything of that kind, for this is merely a question of securing to certain parties the benefits of mines discovered by them within the limits of an Indian reservation. I understand the mines are located at a distance of about a thousand feet inside of the line.

But, sir, I wish to call attention to the second section of the bill. The last clause of the first section declares—

That the land—

Describing it—

> is hereby declared to be public lands of the United States and restored to the public domain.

That raises the point to which I wish to call the attention of my friend from Arkansas, the chairman of the Committee on Indian Affairs. That has not been our policy heretofore when we have taken any portion of these Indian reservations and directed their sale and the proceeds to be invested for the benefit of the tribes. In such cases we have not heretofore made the lands a part of the



public domain, I will suggest to my friend, for the reason that the lands belonging to the public domain are lands belonging to the United States—not lands held in trust for the benefit of the Indians, but belonging actually to the United States, to be appropriated and disposed of under the public laws.

Mr. NELSON. Will the gentleman permit me to interrupt him?

Mr. HOLMAN. Certainly.

Mr. NELSON. I want to call the attention of the gentleman from Indiana, in this connection, if he will allow me, to the fact that in the Montana bill which we passed—the first bill passed the other day—the effect of the legislation there was to throw all that mass of lands open to the public under the general land laws of the United States precisely as this does, only that here is a limitation upon that. In the former case there was no limitation.

Mr. HOLMAN. Ah, but my friend misapprehends my point. In [1928] that case we bought the lands outright. We did not hold that land in trust for the benefit of the Indians, but as a part of the public property, having bought the lands from the Indians and paid for them, in which case the public-land laws of course would apply just exactly as when we acquire lands from Russia or from any other government. They become part of the public domain. If we buy them from the Indians, paying them a fair valuation for them, of course the general land laws would apply. But there we are selling the lands belonging to the Indians for the benefit of the tribe—these Utes—and we are not proposing to divest them of the title, but our proposition is to sell them as their trustee for their benefit, and pay the money into the Treasury, to be invested for their benefit. So it does not become in any sense a part of the public domain.

But further—and my friend will see from the reading of the next section that that position is strengthened by the language used:

That said lands shall be disposed of as other public lands of like kind in accordance with existing laws (except the homestead law shall not apply)—

Now, I do not well see how the general laws can apply there—there is the pre-emption law and other laws.

Mr. PEEL. If the gentleman will permit me to interrupt him, I think I can explain. In this case the evidence is clear that it is sandy, desert land and wholly unfit for agricultural purposes, and clearly the homestead laws would be of no use to anybody. Nobody would want the lands under that law, and therefore it was inserted as a limitation and the price fixed at $1.25 per acre.

Mr. HOLMAN. That is entirely proper. I am agreeing to that, but that the homestead law can not apply to the desert land. We are holding these lands in trust for them. However, I will continue to read from the bill:

and for not less than $1.25 per acre, and not otherwise than for cash entries: *Provided*—

Mr. PEEL: Permit me to interpret to say further that that is exactly the reason why we put $1.25 an acre upon the lands, because we held the land in trust for the Indians and desired to realize that much for them, at least.

Mr. HOLMAN. Of course that is the effect of the provision; but this proviso is as follows:

*Provided,* That any location, entry, or entries, mineral or non-mineral, heretofore made or attempted to be made on said lands, or any part thereof, by any qualified person, shall bear date and be allowed the same as if said lands had been public lands at the time of said attempted location or institution of said proceedings—

That seems to be a fair provision—



but said mineral entries shall not be completed except upon the payment of $20 an acre, or at that rate for the amount taken up by the claim: *And provided further,* That all moneys arising from the sales of this land shall belong to said Indians and be paid into the Treasury of the United States and held or added to any trust funds of said tribes now there.

That seems to be proper enough. Now why should not the gentleman having charge of this bill consent to make this simply a sale of lands by the United States with the consent of the Indians for their benefit, instead of making it a portion of the public domain?

Mr. NELSON. I will explain this to the gentlemen, if he will yield to me for a moment.

Mr. HOLMAN. Certainly.

Mr. NELSON. I desire to call the attention of the gentleman from Indiana to this fact in the first place, that the *locus in quo* here is not agricultural lands, but timber lands. These are either desert or mineral or coal lands. Now, in the public-land laws of the United States we find section 2319 reads as follows:

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occuption and purchase, citizens of the United States and those who have declared their intention to become such under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

I read from section 2325 in regard to the price, as follows:

At the expiration of the sixty days of publication the claimant shall file his affidavit showing that the

> plat and notice have been posted in a conspicious place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

I desire to call the gentleman's attention to that provision of the statute.

Mr. HOLMAN. I know it quite well.

Mr. NELSON. The payment is $5 an acre for gold and silver and $20 an acre for coal lands.

Mr. HOLMAN. Twenty dollars is the maximum.

Mr. NELSON. Section 2347 is as follows:

> SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding 160 acres to such individual person, or 320 acres to such association, upon payment to the receiver of not less than $10 per acre for such lands, where the same shall be situated more than 15 miles from any completed railroad, and not less than $20 per acre for such lands as shall be within 15 miles of such road.

There is there a new mineral substance which has been discovered in this country for the first time. The asphaltum which has been used here has been brought from the



Dead Sea hitherto. This is the only quarry in the country, and it may be a question whether the land containing this new product comes under the head of mineral or coal land. We make them pay under this bill the highest price the Government asks under the general law for coal lands.

Mr. HOLMAN. That seems to me very fair, and yet my friend must perceive that this bill is subject to the criticism that these lands are not intended to be restored to the public domain. I think the bill should have simply directed the lands to be sold in a specific manner; that is, that lands not mineral could be sold for $1.25, and mineral lands up to $20, in such manner as the Secretary may prescribe. I shall, however, waive that point.

But I call the attention of my friend to another matter here. This is not a movement based upon the controlling public policy to reach lands for homes for our people. It is simply a proposition to sell lands especially valuable for minerals to persons who have entered on the lands without authority of law. I call attention to the proposition contained in the third section:

> SEC. 3. That the Secretary of the Interior shall submit this act to the adult male Indians on said reservation, and the restoration shall take effect on a ratification by three-fourths thereof.

Do we not reach a case there which is a mere matter of profit and speculation, where no question of homes to our people is involved? Does not the question present itself there as to whether these Indians should act entirely voluntarily or not? Why in a case of pure speculation exercise the great power we possess over this matter and say the action of three-fourths of the adult male Indians shall govern? In this way we put it on the grounds of tribal relations, to which we are not inclined to attach much importance. Why should not the Indians themselves be the sellers? Why should it not be provided that the Secretary of the Interior shall ascertain whether or not

the Indians wish to sell these lands?—not the majority of them, for we are abandoning the policy of observing tribal relations. If the individual Indians consent to this speculative movement in their lands, why is it not proper to authorize the Secretary of the Interior, in unmistakable terms, to prescribe the rules necessary to ascertain the wishes of the Indians?

Mr. PERKINS. Has he not that authority under this bill?

Mr. HOLMAN. The language is not very definite:

> That the Secreary of the Interior shall submit this act to the adult male Indians of said reservation, and the restoration shall take effect on a ratification by three-fourths thereof.

I suppose under that power he might prescribe any rules he thought proper.

Mr. PERKINS. That was the judgment of the committee.

Mr. HOLMAN. I know I have consumed some time in asking what are the purposes of this bill; but there is one other question which I still desire to submit to the chairman and the members of the committee. I suggest that the Indians themselves should determine each for himself whether he will sell for speculative purposes or not.

Mr. PERKINS. What amendment would you suggest?

Mr. HOLMAN. I would say let all the rest remain except the third section. My friend asked me the question why we should require all to consent? I think we should do so for two reasons. First, there is here no question of high public policy. Then we have been adopting a policy which disintegrates the tribal relations and recognizes the individual Indians; and inasmuch as that appears to be our settled policy, the unwisdom of which I think will appear finally, we should be governed by the logic of our own policy.



Mr. PERKINS. But is there not this difficulty, that the tribal relation does exist here? There has been no individual allotment, and for that reason, as you are treating with them for their tribal lands, you must treat with them as a tribe.

Mr. HOLMAN. But our policy is contemplating the other plan all the time. Every legislative act that we have passed for the last two or three years looks in that direction.

Mr. PERKINS. Certainly, after allotments are made.

Mr. PEEL. Mr. Speaker, one reason why I think it is unnecessary to ask the consent of all these Indians individually is that if that were required then there would be no need for Congressional interference at all. Another is that they do not own the lands. They have a right only to possession and occupancy.

Mr. PERKINS. And it is a tribal occupation.

Mr. PEEL. And it is a tribal occupation, as my friend from Kansas [Mr. PERKINS] suggests. The evidence conclusively shows that these miners discovered, located, and developed this mining interest in good faith, honestly believing that it was upon the public domain. This, therefore, is designed as a mere matter of equity to protect them in a discovery that has certainly been encouraged by the public policy of this Government. Let me say further to my friend from Indiana [Mr. HOLMAN] that the Indian Bureau and the Secretary of the Interior have approved the provisions of this bill by a special letter which is in the possession of my colleague on the committe [Mr. COBB], who reported the bill, and to whom I now yield the floor in support of it.

Mr. COBB. Mr. Speaker, after listening to the remarks of the [1929] gentleman from Indiana [Mr. HOLMAN], I fail to understand exactly what he wants. If I can have his attention for a few moments I will try to ascertain what he wants, which I have not been able to do from his speech. Has the gentleman any objection to the bill?

Mr. HOLMAN. I have the objections I have mentioned. But the bill, of course, can not be amended from my point of view without being entirely redrawn. I do not think these lands ought to be restored to the public domain, but as a matter of fact they are not to be restored, and I waive that point because the bill itself shows upon its face that these lands are to be sold in trust for the benefit of these Indians and not restored to the public domain. They are not made subject to any of the general laws applicable to the public domain. It is simply provided that they shall be sold, the parts of them that are not mineral lands, at $1.25 an acre, and the parts that are mineral lands at $20 an acre, for the benfit of the Indians. My friend [Mr. COBB] will see, therefore, that that portion of the bill which contemplates the restoration of the lands to the public domain is hardly in harmony with the general principles of the bill, but I waive that, because the general purpose will be accomplished.

Mr. COBB. Why dwell upon it, then, if the gentleman waives it?

Mr. HOLMAN. Yes, I waive it.

Mr. COBB. Well, there has been a good deal of talk over it.

Mr. HOLMAN. Yes, I know there has been a good deal of talk, and I think there ought to be a little more talk about these bills. A proposition of this kind, opening up these Indian lands for speculation, is one that I think ought to arrest considerable attention. You gentlemen who are members of the Committee on Indian Affairs are of course much more familiar with these matters than members of the House generally, upon whom they are sprung at the spur of the moment. Therefore you can not complain if some of us occupy a little time in trying to ascertain what we are doing. I think there ought to be added to the third section of the bill a provision that "the Secretary of the Interior shall prescribe rules for ascertaining the wishes of the said Indians, so as to have a



fair expression of their wishes touching the disposition of said lands."

Mr. PERKINS. I think there will be no objection to that.

Mr. COBB. I suppose not. So far as that is concerned, however, it is already in the bill.

Mr. PERKINS. Let that amendment be offered, and then we can proceed with the bill.

Mr. COBB. If that is all the change proposed by the gentleman from Indiana, I suppose we need consume no further time in this matter.

Mr. McRAE. Mr. Speaker, I have an amendment which I wish to propose to the second section. I move to strike out all after the word "as" in the first line of section 2, down to the word "for" in the third line, and to insert other language, so as to make that provision of the bill read:

> That said lands shall be disposed of at public or private sale, in the discretion of the Secretary of the Interior, for not less than $1.25 per acre.

Under the provision of the bill, and as it stands now, we make these lands subject to entry under existing laws except the homestead law, and then declare that there must be a cash entry. The phraseology I have adopted simply declares what appears to be the purpose of the bill, namely, that the land shall not be sold at less than $1.25 an acre.

Mr. COBB. I have no objection to that amendment.

The SPEAKER *pro tempore*. Let the amendment be read.

The Clerk read as follows:

> In lines 1, 2, and 3 of section 2, strike out the words "as other public lands of like kind, in accordance with existing laws except the homestead law shall not apply and," and insert the following: "At public or private sale in the discretion of the Secre-

tary of the Interior." So that if amended as proposed the first part of section will read:

"That said lands shall be disposed of at public or private sale, in the discretion of the Secretary of the Interior, for not less than $1.25 per acre," etc.

Mr. HOLMAN. It may be that, in spite of the information we posess, a portion of this land is adapted to agriculture; and I wish to suggest a provision that these lands which are to be sold at not less than $1.25 an acre shall be sold in quantities not exceeding a quarter-section to any one purchaser. Does the gentleman from Alabama [Mr. COBB] object to that?

Mr. COBB. I do not know that I have any objection, but I would like to hear the amendment read.

The Clerk read as follows:

After the amendment last adopted, insert the following: "In quantities not exceeding one quarter of a section to any one purchaser."

Mr. COBB. Does the gentleman from Indiana limit the amendment to agricultural lands?

Mr. HOLMAN. It is limited necessarily to the lands which are to be sold at $1.25 an acre. The residue of the land would be goverened by the mineral-land law.

Mr. COBB. I do not know that I understand exactly the object of the gentleman. Will he please explain the amendment more fully? We may accept it.

Mr. HOLMAN. The purpose of the amendment is that the non-mineral lands—those which are to be sold at $1.25 an acre—shall be sold in quantities not exceeding a quarter-section to a single purchaser. The other lands —the mineral lands—would of course be governed by the mineral-land law. The mineral lands we do not expect to sell at $1.25 an acre, but at $20 an acre.

Mr. COBB. May not the gentleman's amendment have the effect of withdrawing all this land from the operation of the mineral-land law?



Mr. HOLMAN. I think that is prevented by the express terms of the amendment. This amendment applies to lands which are to be sold at $1.25 an acre. The provision with reference to mineral lands comes afterward. You do not intend to have mineral lands sold at $1.25 an acre?

Mr. COBB. I have very grave doubts whether the gentleman, by these amendments, is not interfering with the interests of the Indians whom we are trying to protect. This bill has received mature consideration at the hands of the Committee on Indian Affairs. We have endeavored to protect the interests of these Indians. The gentleman from Indiana, without having seen the bill before, comes in and proposes to cut into it here and there, seemingly without regard to the effect his amendments may have upon the interests of the Indians concerned.

Mr. HOLMAN. Let the section be read with my proposed amendment.

The section as proposed to be amended was read.

Mr. HOLMAN. To render the meaning absolutely certain, an additional clause is perhaps necessary. I move to amend so that the third line will read, "and the non-mineral land for not less than $1.25 per acre."

Mr. COBB. We accept that amendment.

The SPEAKER *pro tempore* (Mr. MCMILLIN). The present occupant of the chair is informed there is already an amendment pending.

Mr. NELSON. I ask that it be read.

The Clerk read as follows:

After the words "Secretary of the Interior" in the amendment last adopted, insert "in quantities not exceeding one-quarter of a section to any one purchaser."

The amendment was agreed to.

The SPEAKER *pro tempore*. The question now recurs on the amendment last offered by the gentleman from Indiana.

The amendment was agreed to.

Mr. HOLMAN. I now move to add to the third section the language which I ask the Clerk to read.

The Clerk read as follows:

> And the Secretary of the Interior shall prescribe rules for ascertaining the wishes of said Indians and to secure their free action touching the proposed disposal of said lands.

The amendment was agreed to.

The bill as amended was ordered to be engrossed and read a third time; and being engrossed, it was accordingly read the third time, and passed.

Mr. COBB moved to reconsider the vote by which the bill was passed; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

* * * *

CONGRESSIONAL RECORD—SENATE
MAY 7

[3776] UINTAH VALLEY INDIAN RESERVATION

Mr. JONES, of Arkansas. I wish to ask unanimous consent that the pending order be laid aside to take up House bill 7936, Calendar No. 1212, for the purpose of passing the bill.

Mr. REAGAN. If it will lead to no debate I will yield.

The PRESIDING OFFICER. Pending the regular order, the Senator from Arkansas asks unanimous consent that the bill referred to by him may be considered by the Senate. Is there objection?

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill (H.R. 7936) to restore to the public domain a part of the Uintah Valley Indian reservation, in the Territory of Utah, and for other purposes.



The bill was reported from the Committee on Indian Affairs with amendments, in section 2, line 3, after the word "Interior" to insert "and upon his order;" and in line 6, after the word "cash," to strike out "entries;" so as to read:

> SEC. 2. That said lands shall be disposed of at public or private sale in the discretion of the Secretary of the Interior, and upon his order, in quantities not exceeding one-quarter of a section to any one purchaser—the non-mineral land for not less than $1.25 per acre, and not otherwise than for cash.

The amendments were agreed to.

The bill was reported to the Senate as amended, and the amendments were concurred in.

The amendments were ordered to be engrossed and the bill to be read a third time.

The bill was read the third time, and passed.

Mr. COCKRELL. I suggest that there be a conference on the bill.

Mr. JONES of Arkansas. I move that the Senate insist on its amendments and ask for a conference with the House of Representatives thereon.

The motion was agreed to.

By unanimous consent, the Presiding Officer was authorized to appoint the conferees on the part of the Senate, and Mr. DAWES, Mr. JONES, of Arkansas, and Mr. BOWEN were appointed.

* * * *

CONGRESSIONAL RECORD—HOUSE

[3821] UINTAH INDIAN RESERVATION

The SPEAKER also laid before the House the bill (H.R. 7936) to restore to the public domain a part of the Uintah Indian reservation in the Territory of Utah,

and for other purposes, with the amendments of the Senate thereto.

Mr. PEEL. Mr. Speaker, the amendments simply change the phraseology and do not alter the sense of the bill at all. I therefore ask unanimous consent that they be concurred in.

The SPEAKER. The amendments will be read.

The amendments were read, as follows:

Page 1, line 20, after the word "Interior," insert "and upon his order."

Page 2, line 1, after the word "cash," strike out "entries."

Mr. PEEL. The Committee on Indian Affairs have formally passed on the amendments this morning, and I now move that they be concurred in.

The amendments of the Senate were concurred in.

* * * *



**S. Rep. No. 1198, 50th Cong., 1st Sess. (1888) (LD 17)**

SENATE

50th Congress, 1st Session. Report No. 1198

IN THE SENATE OF THE UNITED STATES

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MAY 3, 1888.—Ordered to be printed

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Mr. JONES, of Arkansas, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany bill H. R. 7936.]

The Committee on Indian Affairs of the House, during this Congress, made a report upon this bill in which the material facts seem to be fairly stated, and we adopt the same.

Your committee recommend that the bill pass after amending it, in line 3 of section 2 of said bill, by inserting after the word "Interior" the words "and upon his order," and in line 6, same section, strike out the word "entries."

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[House Report No. 791, Fiftieth Congress, first session.]

*The Committee on Indian Affairs, to whom was referred "a bill to restore to the public domain a part of the Uintah Valley Indian Reservation, in the Territory of Utah, and for other purposes" (H. R. 1984), report as follows:*

There was established, by proclamation of President Lincoln, in Utah Territory on the 3d day of October, 1861, an Indian reservation known as the Uintah Valley (see Executive-orders relating to Indian reservations, extract Commissioner's report 1866, pages 358 and 359), described in the general terms as the Valley of the Uintah River, in said Territory.

By act of Congress approved May 5, 1864 (13 Stats. at Large, page 63), other Indian reservations in said Territory were discontinued, directed to be sold in 80-acre tracts to the highest bidder, and by section 2 the Uintah Valley was set apart for the use of the Indians, and an appropriation was made for the purpose of making agricultural improvements on the same for the benefit of the Indians.

Another act was passed June 18, 1878 (20 Stats. at Large, page 165), repealing the clause of the act of May 5 directing the discontinued reservations to be sold to the highest bidder, and directing the Secretary of the Interior to restore them to the public domain to be disposed of under the public-land laws.

The Interior Department had the Uintah Valley Reservation surveyed; the eastern boundary line was run by one Dubois, and is known as the Dubois line.

In 1885 this line, as well as the township lines bordering on the reservation, were, through lapse of time and other nautral causes, completely lost, so that the citizens living in the neighborhood, the military officers at Fort Duchesne, and the surveyor-general of the Territory, by his deputies, were unable to know of or find its exact location. No marks, corners, or stations were left to indicate where they were.

About this time certain citizens of the Territory, in prospecting for mines, found veins of "Gelsonite," which is the mineral from which "asphaltum" is deduced or manufactured, and the total supply for which in this country is brought from abroad in the vicinity of the Dead Sea, and, in good faith, believing their discovery upon the public domain, applied to the proper officers of the Government to locate the same, as provided for in the mining laws of the United States and said Territory.



The surveyor-general sent his deput upon the ground, and, ignorant of the fact that the veins were on the reservation, he surveyed the same, and the parties proceeded with their steps to get title and to open their mines. They were in about 3 miles of Fort Duchesne, and were not molested by the military in charge, whose duty it was to put them off the reservation; nor by the Indian agents in charge, because every one believed, as they did, that they were upon the public domain.

They opened up their property, and spent between $25,000 and $30,000 upon it and in opening a road across the reservation to the railroad to carry their product to market.

In 1887 Congress authorized the Utah and Midland Railroad to cross the reservation, and in making the same some of the corners of the Dubois and neighboring township lines had to be found, and a rumor was put afloat that these deposits were probably inside the Indian reservation, which rumors reached the locators, and they immediately employed the most skillful surveyor to rerun and mark the necessary lines, which was done with the utmost difficulty and expense and after months of hard labor, but, when completed, revealed the fact that the veins were about 1,000 feet inside the reservation.

Inasmuch as these deposits are the only known deposits of this mineral in the United States, and a new industry was developed by their discovery, it is deemed advisable to restore to the public domain a small portion of the reservation on which the veins are located. This action

has been recommended by the present governor of the Territory in the interest of the general public as promoting the general welfare. His views are concurred in by other prominent citizens of the Territory.

From a letter of the Commissioner of Indian Affairs, transmitted by the Secretary of the Interior, we find that the whole number of Indians on said reservation is about 900, and of this number the male adults are, of Uintah Utes, 123; White River Utes, 110, or 233 in all; that the number of acres of said reservation is 2,039,040, which would give 8,708 acres to each male adult over eighteen years of age; that the amount asked to be restored to the public domain, and which is situated in a corner of the reservation adjoining the public domain, is 7,040, a very small and insignificant part of this great reservation; that the part asked to be restored is a sandstone desert, uninhabited, unfit for agricultural or grazing purposes, and unused by the Indians for any purpose. The affidavits of the five military officers at Fort Duchesne show also that it is utterly worthless for any purpose to the tribes.

In speaking of the propriety of restoring it, the Commissioner of Indian Affairs says:

"As to the propriety of passing such a bill, I would say that if the Indians do not make any use of the lands and are not likely to for any purpose, and are perfectly willing for it to be cut off and opened to the use, occupancy, and benefit otherwise of the whites, I do not know there would be any serious objection to the segregation of the tract in question."

While the Commissioner does not recommend it, he sees no objection if the conditions he states exist, and in his views the Secretary concurs. We find they do exist, and see no reason why it should not be restored, as it is of no value to and is not used by the Indians, and will add greatly to the wealth and prosperity of the Territory and of the country.



The location is peculiarly favorable to restoration, as the Indians live upon the rich and fertile valleys of the Uintah River and its tributaries, and seldom, if ever, cross this small corner. Fort Duchesne lies between them and the deposits, and we believe, as the Commissioner says, that the liability to controversy with the whites will not be increased by its restoration.

The policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it. In doing so it has equitably cared for the Indians, who held a quasi title to the land, and for such settlers who in good faith, had improved and were occupying any portion thereof, believing it to be the public domain. We append the letter of Hon. S. M. Stockslager, Acting Commissioner of the General Land Office, and refer to it for further information on this subject.

The roads built by these parties across the reservation and the furnishing of mineral as return freight to the railroad will enable the Government to get its army and Indian supplies upon the reservation at greatly reduced costs.

Believing, therefore, that it is to the best interests of the Government, the Territory, and the Indians that this small tract of land, valuable alone for the mineral deposit, should be restored, we report a bill for that purpose. Believing that the parties who discovered these deposits and attempted to locate acted in good faith, they should be given, as is customary in the restoration of all reserved lands, priority for their claims. We have so provided in the bill. We also have provided that whatever is realized from the disposition of the lands shall be paid into the trust fund established for the Indians, so they will be more than equitably compensated for their loss. As there were some errors in the bills submitted, we report the accompanying bill upon the subject, and recommend its passage.

**Act of May 24, 1888, 25 Stat. (LD 18)**

[157] CHAP. 310.—An act to restore to the public domain a part of the Uintah Valley Indian Reservation, in the Territory of Utah, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That so much of the Uintah Valley Indian Reservation, in the Territory of Utah, established by proclamation of the President, of date of October third, eighteen hundred and sixty-one, as lies within the following boundrey, namely: Beginning at mile-post numbered nineteen, DuBois' survey, from the initial point established in township eight south, range twenty east, Salt Lake meridian; thence southerly to the northeast corner of township two south, range one east, Uintah special meridian; thence south long the east boundary of township two south, range one east Uintah special meridian, to the south-east corner of township two south, range one east, Uintah special meridian; thence east along the north boundary of township three south, range two east, Uintah special meridian, to its intersection with the east boundary of the Uintah Indian Reservation, thence in a northwest direction with the eastern boundary line of said reservation to the beginning, be, and the same is hereby, declared to be public lands of the United States and restored to the public domain.

SEC. 2. That said lands shall be disposed of at public or private sale in the discretion of the Secretary of the Interior, and upon his order, in quantities not exceeding one quarter of a section to any one purchaser, the non-mineral lands for not less than one dollar and twenty-five cents per acre, and not otherwise than for cash: *Provided,* That any location, entry, or entries, mineral or non-mineral, heretofore made or attempted to be made on said lands, or any part thereof, by any qualified person, shall bear date and be allowed the same as if said lands had



been public lands at the time of said attempted location or institution of said proceedings, but said mineral entries shall not be completed except upon the payment of twenty dollars an acre, or at that rate for the amount taken up by the claim: *And provided further,* That all moneys arising from the sales of this land shall belong to said Indians and be paid into the Treasury of the [158] United States and held or added to any trust funds of said tribes now there.

SEC. 3. That the Secretary of the Interior shall submit this act to the adult male Indians on said reservation, and the restoration shall take effect on a ratification by three-fourths thereof, and the Secretary of the Interior shall prescribe rules for ascertaining the wishes of said Indians and to secure their free action touching the proposed disposal of said lands.

Approved, May 24, 1888.

**S. Rep. No. 450, 53d Cong., 2d Sess. (1894) (LD 27)**

SENATE

53d Congress, 2d Session Report No. 450

IN THE SENATE OF THE UNITED STATES

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MAY 29, 1894.—Ordered to be printed.

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Mr. SHOUP, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany S. 1887.]

The Committee on Indian Affairs, to whom was referred the bill (S. 1887) providing for opening the Uncompahgre and Uintah Indian reservations, submit the following report:

This bill provides for making allotments in severalty to the Indians now occupying the Uintah and Uncompahgre reservations in Utah, and for opening to sale and settlement the reservation lands remaining after such allotments are made. The status of these reservations and the reasons for the policy indicated have been thoroughly canvassed in several reports of Congressional committees and of the various officials of the Interior Department, particularly in the report upon H. R. 6557, which is



annexed hereto and submitted as a part of this report, and to which reference is made for a statement of the facts and of the considerations which explain the various features of the proposed measure. The bill, S. 1887, is a duplicate of that reported to the House of Representatives and recommended for passage by the Committee on Indian Affairs of that body.

For the reasons stated in the report referred to, your committee is of the opinion that the bill, as amended, be favorably reported and recommend its passage.

Amend secetion 1 by adding after the word "location," in line 22:

> *And provided further,* That the stipulation contained in the treaty with the Ute Indians, ratified by act of Congress June 15, 1880, whereby the said Indians are obligated to pay for the lands allotted to them in severalty, be, and the same is hereby waived by the United States, and the allotments provided for by this act shall be made without any price to be paid or charge to be made against any funds to the credit of said Indians.

The reason for recommending this amendment is that an effort to enforce the stipulation of the treaty of 1880 at this date would doubtless cause irritation on the part of the Indians, and might provoke resistance. While under the terms of that treaty a charge of $1.25 per acre might be made against the funds of the Indians for the areas allotted to them, the fact remains that this obligation is very imperfectly, if at all, appreciated by the Indians, and that they have from their long residence upon their present reservation acquired a conviction that the lands belong to them.

In the twelve or fourteen years which have elapsed since the removal of the band from their aboriginal seat in Colorado, a new generation has come into the active management of tribal affairs, and to many of the band the treaty of 1880 is only a tradition, while occupancy of the Utah Reservation is a present fact. It is obviously quite natural, however unreasonable, that the Indians should feel themselves entitled to hold the existing reservation, and should object to making payment for the fraction of that reservation which they will be allowed to retain. Under these circumstances, it is submitted that it is a wiser policy to waive the right of the Government to payment for the lands allotted than to incur the friction, delay, and possible strife which might follow an effort to enforce the letter of the treaty.

Amend section 1, after the word "office," in line 25, by inserting—

> Patents for the tracts allotted shall be issued to the several allottees in accordance with the provisions of the act of Congress regulating allotments to Indians in severalty, approved February 8, 1887.

The addition of this provision is recommended on the ground that the bill as it stands is silent as to the issue of patents, and, in the absence of specific authority for such action, there might be doubt as to the legality of giving the allottees proper muniments of title.

Amend section 2, line 3, after the word "the," by striking out the word "homestead' 'and inserting in lieu thereof the words "general land laws, town site."

The committee are advised that much of the land on this reservation requires irrigation, and the land should, therefore, be open to entry under the desert-land act, including homestead and all other existing land laws.



Amend section 4, line 11, after the word "shall," by inserting "be concurred in by two-thirds of the male members of the tribe over the age of 18 years, and."

This provision seems necessary in order to make certain what vote of the Indians shall be regarded as expressing the will of the tribe.

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[House Report No. 660, Fifty-third Congress, second session.]

The Committee on Indian Affairs, having had under consideration House bill 4511, do hereby report the accompanying bill as a substitute therefor, and recommend that it be passed.

The substitute bill provides for the appointments of a commission of three persons to allot lands in severalty to the Uncompahgre Indians within their reservation in the Territory of Utah in accordance with the treaty made with said Indians in 1880, and make subject to entry the lands not needed for such allotments. The bill also authorizes the same commission to treat with the Indians upon the Uintah Indian Reservation in Utah for the cession to the United States of such lands within said reservation not needed for allotments to the Indians.

The Uncompahgre Reservation embraces an area of 1,933,440 acres, or 3,021 square miles of land, and is occupied by 1,021 Indians, or 1,893 acres to each Indian. Of these Indians 513 are males and 508 females, according to the census of 1890.

The Uintah Reservation, which is contiguous to the Uncompahgre, contains an area of 2,039,000 acres, or 3,186 square miles, occupied by 435 Uintah Indians and 398 White River Utes, a total of 833 Indians, being 2,450 acres to each Indian.

It has been estimated by the surveyor-general of Utah that 60 per cent of the lands within each of these two reservations is suitable for agriculture and capable of irrigation.

The rights of the Indians upon the Uintah Reservation differ from those of the Indians upon the Uncompahgre Reservation. The Uncompahgre Indians have no title to any of the lands within the reservation, nothing more than the privilege of temporary occupancy. Such is the conclusion arrived at after careful investigation by the law officers of the Government. The Assistant Attorney General, Mr. Hall, in his report to the Secretary of the Interior dated October 23, 1893, says:



"As to the Uncompahgre title these Indians, with other bands of Ute Indians, were, by treaty of March 2, 1868, which was proclaimed November 6, 1868, given a portion of the Territory of Colorado for their absolute and unconditional use. These Indians had title to such lands as were thus given them in the State of Colorado, and the metes and bounds of their said reservation are set forth in said treaty of 1868 and the act ratifying the same. Subsequently, on the 6th of March, 1880, said Indians entered into an agreement with the United States whereby they ceded to the United States all their lands in the State of Colorado. This agreement was ratified by Congress on June 15, 1880 (21 Stats., 199), and subsequently, and within the time prescribed in said act of Congress, the agreements and amendments made thereto by the act of Congress were ratified by three-fourths of the male adult Indians. In the agreement of 1880 the following provision is found:

" 'The Uncompahgre to remove and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there; if not, then upon such other agricultural lands as may be found in that vinicity and in the Territory of Utah.'

"These Indians were not placed on the lands referred to, 'on the Grand River near the mouth of the Gunnison River in Colorado,' because a sufficient quantity of agricultural lands could not be found for that purpose; hence, they were removed to the Territory of Utah, to the lands which they now occupy.

"The agreement of 1880 provided that the lands to which these Indians were to be removed was to be surveyed and divided among them in severalty, in certain specified quantities, for which purpose a commission was

to be appointed by the President. They were removed from Colorado onto their present reservation in 1882. By executive order of January 5, 1882, the lands which they now occupy were 'withheld from sale and set apart as a reservation for the Uncompahgre Utes.'

"The act of Congress, approved June 5, 1880, which ratified the agreement with these Indians, required that the lands ceded to the United States should be disposed of as follows:

" 'None of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the homestead law, and when sold the procedes of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the Government for the benefit of said Indians, and then be applied in payment for the lands, at $1.25 per acre, which may be ceded to them by the United States outside of their reservation in pursuance of this agreement.'

"It will be seen from this provision of the act of 1880 ratifying the agreement, and which was accepted by the Indians, as hereinabove stated, that the Uncompahgre Indians are to pay the United States for such lands as they may receive as allotments by virtue of said agreement, at the rate of $1.25 per acre; and that the proceeds of the sale of their lands in the State of Colorado are to be held for this purpose, as well as for reimbursing the United States all sums paid out or set apart under the act of 1880. It is clear to my mind that the Uncompahgre Utes have no title to the lands they occupy; that they occupy these lands as a temporary reservation, until such time as the President may require them by virtue of the agreement and the act of 1880 to take their allotments within the limits of said reservation. When the lands are alloted to these Indians, then they will become absolute owners of the same, with such restrictions upon the right to lease and alienate as is set out in the agreement of 1880; but until their allotments are taken and



the lands set apart for them in severalty, they have no such title to the lands as would authorize them to lease the same for any purpose."

By their agreement of March 6, 1880, these Indians agreed to accept allotments as provided in the substitute bill reported. This agreement was ratified by the act of Congress dated June 15, 1880 (21 Stat., 199). Under the agreement the Indians were to pay for the lands allotted to them at the rate of $1.25 per acre. The accompanying bill omits this requirement, allowing the Indians to receive the allotment provided for without making such payment. The Assistant Attorney-General further says:

"I do not know of any other treaty obligations of the United States to the Uncompahgre Indians, except the duty of protecting them in their title to lands whenever the lands shall be allotted to them, as provided in the first article of the agreement of March 6, 1880 (21 Stat., 199 supra):

"That the Government of the United States cause the lands so set apart to be properly surveyed, and to be divided among these said Indians in severalty in the proportion hereinabove mentioned, and to issue patents in fee simple to them respectively therefor so soon as the necessary laws are passed by Congress. The title to be acquired by the Indians shall not be subject to alienation, a lease, or incumbrace, either by voluntary conveyance of the grantee or by the judgment, order, or decree of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President of the United States may see fit to remove the restrictions, which shall be incorporated in the patents when issued; and any contract made prior to the removal of such restrictions shall be void."

As to the Uintah Indians the Assistant Attorney-General finds that the Indians are the owners of the lands

within the reservation, because, under the act of Congress of May 5, 1864 (13 Stat., 64), it was provided that the lands within the Uintah Reservation should be "set apart for the permanent settlement and exclusive occupation of the Indians." In order, therefore, to make available for settlement any portion of the lands within the Uintah Reservation it is first necessary to obtain the consent of the Indians residing thereon. Accordingly, the bill provides that the commissioners appointed shall treat with said Indians for the purpose of obtaining a relinquishment of their title to any land not needed for allotment to Indians.

These two reservations are situated in the northeastern portion of Utah, and together embrace a tract of about 4,000,000 acres, occupied by less than 2,000 Indians, men, women, and children. The Indians, in their present condition, make no use whatever of a very large proportion of these lands, which are rich in resources and capable of sustaining a large population if reclaimed and utilized.

If the consent of the Indians upon the Uintah Reservation can be obtained, by which they will accept allotments of lands in severalty, and the remainder of the lands is sold and the proceeds derived are used for the benefit of the Indians, their condition will be much better than it is at present. These Indians have already made considerable progress toward civilization, and are entirely competent to receive lands in severalty, and are in a condition to reclaim and improve them. If the residue of the lands are settled by whites the Indians will be more directly brought in contact with civilization and be able to make greater progress by the example thus afforded them.

As to the Uncompahgre Indians, as has already been shown, they have agreed to accept lands in severalty as provided in the bill. They are in a condition to adopt this mode of life. The proceeds of the sale of their lands in Colorado now amount to more than $1,700,000. One-



half of this amount is held and applied for the benefit of the Uncompahgre Indians. The Assistant Attorney-General in his letter to the Secretary of the Interior of February 16, 1894, says:

"As to the Uncompahgre Indians, I gave it as my opinion that they occupy the lands in Utah upon which they are located as a temporary reservation. They can be required at any time, by Congress or by the President, to take their allotments in said lands. As to these Indians, I can see no reason why their consent should be asked to any disposition Congress may see proper to make of these lands after allowing them allotments as provided in the agreement and act of Congress referred to in my opinion, a copy of which is hereto attached."

The Secretary of the Interior, in his letter of March 22, 1894, addressed to the chairman of this committee, speaking in regard to the Uncompahgre Indians says:

"The confederated bands of Ute Indians, by agreement ratified by act of June 15, 1880 (21 Stat., 199), sold to the United States their reservation in Colorado and agreed to remove to other lands. It was further provided that the Indians might take allotments upon the lands to which they should remove, as follows:

" 'To each head of a family one quarter of a section, with an additional quantity of grazing land not exceeding one quarter of a section.

" 'To each single person over eighteen years of age one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section.

" 'To each orphan child under eighteen years of age one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; and to each other person under eighteen years of age, now living, or who may be born prior to said allotments, one-eighth of a section, with a like quantity of grazing land.'

"It was also provided that the proceeds of the sale of the lands in Colorado ceded by said agreement should be 'first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the Government for the benefit of said Indians, and then to be applied to payment for the lands at $1.25 per acre which may be ceded to them by the Unted States outside of their reservation, in pursuance of this agreement,' the balance to be deposited in the Treasury for the benefit of said Indians.

"Under this agreement the Indians were removed to their present location, but allotments have not been made. Afterwards, for their protection, the present reservation was designated by Executive order. It is clear that these Indians have no such title in the lands of this reservation as would entitle them to receive pay for such lands as might remain after they had taken their allotments, for which allotments they are required to pay $1.25 per acre."

In respect to the rights of the Uintah Indians the Secretary uses this language:

"With regard to the Uintah Reservation the facts are somewhat different. I concur in the opinion of the Assistant Attorney-General that these Indians have a title to the land which they occupy which should be acquired by the United States only by negotiations with them for that purpose. A commisison might properly be authorized to conduct such negotiations on the part of the Government. There is sufficient agricultural lands in this reservation to proivde allotments for all the Indians belonging there, and probably for those of the Uncompahgres who can not be provided for on their own reservation. The fact that it may be found necessary to settle some of the Uncompahgres upon the Uintah Reservation should be taken into consideration when negotiations shall be had as to the latter."



As to the method of disposing of the unallotted lands on these reservations, the Secretary of the Interior uses this language:

"The manner of disposing of the lands remaining after allotments shall have been made can be more satisfactorily determined after the question of allotments has been settled. If negotiations are to be had and any money paid to the Indians the price at which the surplus lands are to be disposed of would be affected if not controlled by the amount to be paid to the Indians. It may be thought proper, however, because of the great value of deposits of asphaltum, gilsonite, and other like substances said to abound in these lands, to make a special provision for their sale at a higher price than is usually fixed for mineral land.

"My opinion at present is that the surplus lands which are agricultural in character should be opened to settlement under the homestead laws, with a provision for payment, in addition to the regular fees, of such amount per acre as will reimburse the United States for any money agreed to be paid the Indians, and that such lands as are mineral in character shall be disposed of under the mineral laws with a like additional payment."

It will thus be seen that in the substitute bill reported the committee have taken into consideration, as nearly as could be ascertained, the rights of the Indians upon the two reservations, and have conformed, as nearly as possible, to the suggestions and recommendations of the Secretary of the Interior both as to the method of dealing with the Indians and of disposing of the lands when thrown open to settlement.

It seems quite clear to the committee, from its investigation and the information received upon the subject, that legislation should be enacted without delay looking to the adjustment of the rights of the Indians, and their settle-

ment in such way that they may make progress toward civilization, and that the great resources, agricultural and mineral, which are known to exist within these reservations, should be made subject to development.



**Excerpts from 26 Cong. Rec. (1894) (LD 33)**

CONGRESSIONAL RECORD—HOUSE
JUNE 30

[7032] UNCOMPAHGRE AND UINTAH INDIANS

Mr. RAWLINS. Mr. Speaker, I ask unanimous consent for the present consideration of the bill (H. R. 6557) providing for opening the Uncompahgre and Uintah Reservations in Utah.

The SPEAKER. The gentleman from Utah [Mr. RAWLINS] asks unanimous consent for the present consideration of a bill which the Clerk will report, after which the Chair will ask if there be objection to its consideration.

The Clerk read as follows:

*Be it enacted, etc.*, That the President of the United States is hereby authorized and directed to appoint a commission of three persons, within thirty days after the passage of this act, to allot in severalty to the Uncompahgre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands according to the treaty of 1880, as follows:

"Allotments in severalty of said lands shall be made as follows: To each head of a family one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section; to each single person over 18 years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each orphan child under 18 years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each other person under 18 years of age, born prior to such allotment, one-eighth of a section, with a like quantity of grazing land: *Provided,* That with the consent

of said commission, any adult Indian may select a less quantity of land, if more desirable on account of location." All necessary surveys, if any, to enable said commission to complete the allotments shall be made under the direction of the General Land Office. Said commissioners shall, as soon as practicable after their appointment, report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.

SEC. 2. That the remainder of the lands on said reservation shall, upon the approval of the allotments by the Secretary of the Interior, be immediately open to entry under the homestead and mineral laws of the United States; *Provided,* That after three years' actual and continuous residence upon agricultural lands from date of settlement the settler may, upon full payment of $1.50 per acre, receive patent for the tract entered. If not commuted at the end of three years the settler shall pay, at the time of making final proof, the sum of $1.50 per acre: *Provided,* That the minimum price of mineral lands known to contain asphaltum shall be $50 per acre.

SEC. 3. That persons otherwise qualified to make entries who have, in good faith, made mineral discoveries and locations within the limits of said reservation prior to the 1st day of July, 1890, and who have complied with the law in regard to the entry and location of mineral lands as far as practicable, shall, upon the opening of said lands to entry, have the preferred right of entering their respective locations for thirty days next after such opening, but no longer.

SEC. 4. That said commission shall also negotiate and treat with the Indians properly residing upon the



Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and, if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by act of Congress.

SEC. 5. That said commissioners shall receive $6 per day each, and their actual and necessary traveling and incidental expenses while on duty, and to be allowed a clerk, to be selected by them, whose compensation shall be fixed by said commissioners, subject to the approval of the Secretary of the Interior; and a sufficient sum is hereby appropriated to carry out the provisions of this act, which sum shall be reimbursed to the Treasury out of the proceeds of the sale of said lands.

The SPEAKER. Is there objection to the request of the gentleman from Utah?

Mr. DOCKERY. Mr. Speaker, I have given some examination to the bill. I am willing, as far as I am concerned, to give consent for its consideration, provided the gentleman will agree to strike out at this time, in offering the bill, section 3, and also that later on he will incorporate an amendment limiting the entire cost to $16,000.

Mr. WILLIAM A. STONE. Mr. Speaker, I should like to have some explanation of this bill before I consent to its passage. It is a very important bill.

The SPEAKER. Without objection the gentleman will make an explanation.

Mr. MCMILLIN. This is a long bill. Suppose we have the report read.

Mr. RAWLINS. I can state the purport of the bill.

Mr. LYNCH. It is quite long, and perhaps a statement of it would cover the grounds better. I am somewhat familiar with the facts.

Mr. McMILLIN. Let us hear a statement of it, and then if it is desired the report can be read.

Mr. RAWLINS. Mr. Speaker, the provisions of this bill, relate to two Indian reservations in the Territory of Uth, one the Uncompahgre Reservation and the other the Uintah Reservation.

The Uncompahgre Reservation contains 1,933,440 acres of land, and is occupied, as shown by the last census, by 1,021 Indians, or about 7,600 acres of land to each family of Indians of four persons.

These Indians formerly owned a large section of land in Colorado. In 1880, by treaty, they sold these lands to the United States. The fund to the credit of these Indians arising from the sale of this land amounts now to about $1,700,000.

By the treaty made with these Indians they were to have lands allotted to them, as provided in this bill, by a commission to be appointed by the President. If the lands allotted to them were not within their old reservation in Colorado they were to pay for the lands at the rate of $1.25 per acre. This bill simply provides for carrying out the treaty made with those Indians, and which was ratified by act of Congress, by making allotments to the Indians in exact accordance with the terms of that treaty with them. It will take about 200,000 acres of land to satisfy the allotment.

That is the extent of the provisions of the bill so far as the Uncompahgre Indian Reservation is concerned. It is held by the law department of the Government that these Indians only [7033] had the right to the temporary occupancy of this reservation, with the right to have allotments made to them according to their treaty, and this bill carries out that provision of the treaty,



As to the Uintah Reservation, that contains about 2,100,000 acres of land. It is occupied by 833 Indians, as shown by the last census. This reservation is contiguous to the Uncompahgre Reservation. The bill provides that this commission of three persons, appointed by the President, shall treat with those Indians for the cession to the United States of such portions of the land within that reservation as are not needed for allotment in severalty, and to report any agreement made with them to Congress for ratification.

Mr. CURTIS of Kansas. Will the gentleman permit me?

Mr. RAWLINS. Yes.

Mr. CURTIS of Kansas. There is an effort here, as I understand, to strike out section 3. I should like to have that explained. As I understand it, being a member of the committee, that section was put in there to protect certain innocent parties who had discovered valuable asphalt deposits upon this reservation. I should like to have the gentleman explain that. Otherwise, I can not consent to the bill being passed with that section stricken out.

Mr. RAWLINS. I would state, in regard to section 3, that prior to 1890 certain parties, before the boundaries of the Uncompahgre Reservation were actually designated, made the discovery of some asphaltum lands, and not being able to ascertain that they were within the reservation, took steps to make entries of the land in accordance with the mineral land laws of the United States, and the provision of this section was to give them a preferred right of entry for thirty days after the opening of the reservation. I would state to the gentleman from Kansas that the gentleman from Missouri [Mr. DOCKERY] made objection to this provision in the bill, on the ground that it showed some favoritism, and that he believed all people ought to have an equal chance to make entries.

Rather than have the bill delayed I preferred to consent that that section should go out, and for this reason: The

Supreme Court of the United States, in 121 United States Reports, in a case like this, arising in the Black Hills, where persons in good faith made mineral discoveries and locations within an Indian reservation, held that upon the opening of such reservation those parties would have the right to prove such act of possession prior to the opening as tending to show their possession, and such persons were given a preferred right against subsequent locators. So that, without this section, I think that those persons who have gone upon such reservations who have got an equitable right at the opening of the land would be protected.

Mr. CURTIS of Kansas. Not without a lawsuit, would they?

Mr. RAWLINS. Well, I think so. I have submitted this question to the Department, and I think they are fully protected in so far as they show that their rights have accrued in good faith.

Mr. CURTIS of Kansas. The gentleman knows this fact, that there are a large number who have made discoveries, who, have attempted to make entries, and they did it in good faith, and that such a showing was made to our Indian Committee.

Mr. RAWLINS. I am aware of that. I think those parties will be protected fully in their rights; and believing that, I prefer, rather than have this bill delayed, that it should be passed without this section. I will say that this bill is approved and recommended by the Secretary of the Interior. It is unanimously reported by the Committee on Indian Affairs to the House. It has been favorably reported by the Senate Committee on Indian Affairs, and it is an urgent matter.

Mr. WILLIAM A. STONE. May I ask the gentleman a question?

Mr. RAWLINS. Yes, sir.

Mr. WILLIAM A. STONE. How many acres belonging to the Government does this bill distribute among the Indians?



Mr. RAWLINS. It will require from 160,000 to 200,000 acres to satisfy the Uncompahgres.

Mr. WILLIAM A. STONE. Two hundred thousand acres of land belonging to the Government of the United States are to be allotted among these Indians by this bill. Is that so?

Mr. RAWLINS. Yes, in accordance with a treaty already made with the Indians, and which treaty was ratified by act of Congress.

Mr. WILLIAM A. STONE. That may all be true; but it seems to me that that is too important a thing to be done by unanimous consent; and therefore, Mr. Speaker, I will have to object.

Mr. RAWLINS. Will the gentleman agree to take up the bill, say for an hour, or some such time?

Mr. WILLIAM A. STONE. I will not object to it; but it does seem to me that a matter of such importance as 200,000 acres of land, which I suppose is certainly worth a great deal of money, ought not be disposed of in this way.

Mr. RAWLINS. Let me say to the gentleman that this bill has been indorsed by the Interior Department and the law department, and the rights of the Indians have been fully ascertained, and also the obligations of the Government. It is reported favorably by those expected to pass on the bill. It is desirable that the bill should pass now, so that this commission can go to work and accomplish what it is desired that they should accomplish during the present summer, in order that the treaty made with the Indians may be reported to Congress at the next session.

Mr. WILLIAM A. STONE. What committee reported this bill; the Committee on Indian Affairs?

Mr. RAWLINS. Yes, sir; it is unanimously reported by the Committee on Indian Affairs, and also by the Senate committee; and it is expressly recommended by the Secretary of the Interior.

Mr. LYNCH. I will say to the gentleman that these Uncompahgre Indians occupied a reservation in Colorado from 1868 to 1882, and then they were moved from that reservation in Colorado and were temporarily placed upon this reservation until a suitable location could be obtained for them.

Three tribes of them were paid at that time $1,700,000 for their lands in Colorado, with the understanding that those Indians, whenever a suitable place could be found for them, would be assigned another reservation. They were placed temporarily upon this, which contains about 2,000,000 acres; and there are about 1,000 Indians, old and young. Now, they have no right on this reservation except that of possession, because it has not been assigned to them regularly.

Mr. WILLIAM A. STONE. Mr. Speaker, I will look into this matter, but I would not like to allow the bill to pass by unanimous consent just now. It is altogether too important, as it involves 200,000 acres of land belonging to the Government.

Mr. PENDLETON of Texas. As a member of the Committee on Indian Affairs, I wish to say that there are about 2,000,000 acres of this land. Under the treaty made in 1880 the Indians will receive from 160,000 to 200,000 acres, releasing to the Government for sale 1,800,000 acres.

Mr. WILLIAM A. STONE. I will examine the bill; but for the present I object.

* * * *

CONGRESSIONAL RECORD—HOUSE
JULY 10

[7256] UNCOMPAHGRE INDIANS

The SPEAKER. The Committee on Indian Affairs is next called.



Mr. LYNCH: Mr. Speaker, I am directed by the Committee on Indian Affairs to call up the bill (H.R. 6557) providing for opening the Uncompahgre and Uintah Indian Reservation in Utah.

The SPEAKER. This bill is on the Union Calendar.

Mr. LYNCH. I ask unanimous consent that the bill be considered in the House as in Committee of the Whole.

Mr. WILLIAM A. STONE. I shall have to object. I have an amendment to propose to the bill.

Mr. LYNCH. I move that the House resolve itself into the Committee of the Whole for the purpose of considering the bill.

The motion was agreed to.

Accordingly the House resolved itself into Committee of the Whole on the state of the Union, for the consideration of the bill (H.R. 6557) providing for opening the Uncompahgre and Uintah Indian Reservations in Utah, with Mr. DOCKERY in the Chair.

* * * *

Mr. RAWLINS. Mr. Chairman, I ask unanimous consent that the bill be considered under the five-minute rule.

Mr. SAYERS. I desire to have an understanding before consenting to any proposition whatever with reference to the passage of the bill. If the gentleman will agree to strike out the third section and also to adopt the amendment which we have agreed upon to another clause of the bill, then I will have no objection to its passage.

Mr. HOLMAN. What is that second amendment you suggest?

Mr. SAYERS. The gentleman has the amendment.

Mr. RAWLINS. I have it, and will offer the amendment. So far as I am personally concerned, I will agree to that proposition.

Mr. SAYERS. Mr. Chairman, it is agreed that the third section of the bill may be considered as stricken out,

and the amendment that the gentleman has to a clause of the bill shall be adopted. With that understanding—

Mr. HOLMAN. That would have to be read.

Mr. WILLIAM A. STONE. I want to have something to say before this matter is agreed upon. I want to ask the gentleman if he will consent to an amendment to the first section of the bill, which I will read:

> *And provided,* That the said Indians shall pay $1.25 per acre for said land from the funds now in the United States Treasury realized from the sale of their lands in Colorado as provided by their contract with the Government.

Mr. RAWLINS. I have no objection to that amendment.

Mr. HOLMAN. That, I think, is hardly fair.

Mr. LYNCH. Is it true, Mr. Chairman, that under the treaty of 1880—

Mr. WILLIAM A. STONE. Unless that amendment is embodied in the bill I shall have to object to any unanimous consent.

Mr. LYNCH. Offer your amendment at the proper time.

Mr. WILLIAM A. STONE. Unless the gentleman shall consent to that, I shall have to object to the consideration of this bill by unanimous consent.

Mr. RAWLINS. I will consent, so far as I am concerned.

Mr. LYNCH. I am willing to take a vote of the House as to that proposition. I am entirely in favor of the proposition.

Mr. RAWLINS. I am entirely agreeable to that. It ought to be done.

[7257] Mr. LYNCH. The committee has no objection to it. I think it is a proper proposition to be submitted.

Mr. RAWLINS. Then I ask unanimous consent that the bill be considered under the five-minute rule.

Mr. CANNON of Illinois. Is this bill being considered in Committee of the Whole or in the House?



The CHAIRMAN. In Committee of the Whole.

Mr. WILLIAM A. STONE. Do I understand our friends on the committee will object to this amendment and oppose it?

Mr. LYNCH. Wait until it is offered.

Mr. WILLIAM A. STONE. We had better have the understanding now.

Mr. CANNON of Illinois. Mr. Chairman, it seems to me that there are so many agreements being made and proposed to a bill that most of us know nothing about, that it might be well to take a little time in general debate so as to allow the gentleman to explain it, and let the balance of us know what they are trying to agree about, and after they have done that we will be able to act more intelligently.

The CHAIRMAN. The Chair understands the gentleman from Illinois to object.

Mr. LYNCH. I ask that general debate be closed on the bill at quarter after 1.

Mr. CANNON of Illinois. Let us know what the bill is.

Mr. RAWLINS. Mr. Chairman, if I can have the attention for a few minutes of the members of the committee, I think I can make clear the provisions of this bill. The bill relates to two Indian reservations in the Territory of Utah; one the Uncompahgre Indian Reservation, and the other the Uintah Reservation. The Uncompahgre Reservation contains about 1,900,000 acres of land, and is occupied by 1,021 Indians, as shown by the last census. These Indians, together with two other tribes of Indians, formerly owned about 12,000,000 acres of land in the State of Colorado.

In 1880 they entered into a treaty with the United States by which they sold those lands to the Government, and these Uncompahgre Indians, about 1,000 of them, were temporarily located by proclamation of the President upon this reservation, called the Uncompahgre Reservation. By the treaty made with these Indians they

were to have an allotment of land in severalty, as provided in this bill, by a commission to be appointed by the President. They were to get this allotment instead of the reservation in Colorado, and to pay for that at the rate of $1.25 per acre.

This treaty was made with the Indians and ratified by act of Congress. The object of this bill is to carry out the provisions of that treaty with these Indians, making allotments to them in severalty. It will require, to carry out the treaty, about 200,000 acres of land, and there will be then thrown open for settlement between 1,700,000 and 1,800,000 acres. This bill provides that the agricultural lands shall be subject to entry under the homestead laws at $1.50 per acre.

Mr. CANNON of Illinois. If I understand this proposition correctly, it is that about 200,000 acres of land in this reservation in Utah are to be paid for out of the fund realized by the Indians from the sale of their reservation in Colorado.

Mr. RAWLINS. Yes, sir. That fund, amounting to about $1,700,000, is in the Treasury of the United States; and about half of it is to the credit of the Indians of the Uncompahgre Reservation.

Mr. CANNON of Illinois. And you propose to allot 200,000 acres in severalty to those Indians, for which they are to pay—

Mr. RAWLINS. One dollar and twenty-five cents an acre.

Mr. WILLIAM A. STONE. No; nothing at all, under this bill.

Mr. RAWLINS. The price would be $1.25 an acre according to the treaty; but in this bill the committee are silent—

Mr. SAYERS. You propose really to give them the land.

Mr. CANNON of Illinois. Why do better for them than the treaty provides?



Mr. RAWLINS. I am in favor of requiring the Indians to pay for these lands; I think they ought to do so; and the amendment proposed by the gentleman from Pennsylvania to accomplish that is perfectly agreeable to me.

Mr. CANNON of Illinois. And the proposition is to take the remainder and open it to homestead settlement at $1.50 an acre.

Mr. RAWLINS. Yes, sir.

Mr. CANNON of Illinois. And that is all there is in the bill?

Mr. RAWLINS. That is substantially all there is in it.

Mr. SAYERS. Oh; no; there are some other things in the bill.

Mr. RAWLINS. So much as to the agricultural lands. Now, the mineral lands are to be subject to entry under the mining laws of the United States. Under those laws a man who discovers the mineral may locate a tract not exceeding 1,500 feet in length and 600 in width, and by complying with the law and finally making payment at the rate of $10 an acre he can obtain a patent from the United States for that limited quantity. Only citizens can make these entries. Now, there has been found on this reservation the mineral known as asphaltum. This mineral, according to the best information I have been able to obtain, has been found in veins or lodes, similar to silver and other metals of that character.

Mr. HOLMAN (exhibiting a specimen). Here is a specimen of the asphaltum.

Mr. RAWLINS. Yes, sir. Now, this bill provides that these asphaltum lands may be located under the mining laws; that is to say, the man who discovers the mineral may locate a tract not exceeding 1,500 feet one way and 600 feet the other. It is provided in the bill that the minimum price per acre for this land shall be $50. The price for ordinary mineral lands under the existing law is $10 an acre; but the committee thought—and such was the suggestion of the Secretary of the Interior and the

officers of the Land Department—that $50 would be about the right price for these lands.

The third section of the bill, to which objection has been made, provides that where citizens of the United States or persons otherwise qualified have made discoveries and locations in good faith prior to 1890, and complied with the mining laws so far as practicable, they shall upon the opening of this reservation have for thirty days a preferred right to make entry on these lands.

Mr. SAYERS. I ask the gentleman to give us a full explanation of the bill on this subject which was passed by the last Congress and vetoed by the President.

Mr. RAWLINS. I will do so. I propose to state fairly every thing pertaining to this bill if I know how to do it.

The committee considered whether they ought to give these people this preferred right, and decided it should be given to persons who actually made these mineral discoveries and locations under the mining laws prior to 1890. Why? The eastern boundary of this reservation is on the Colorado line. It was not defined prior to 1890, and a few persons, probably fifteen or twenty in number, discovered these locations, located upon them and expended their money in developing the claims, being all the time ignorant of the fact that they were within the reservation, supposing themselves to be within a county or the State of Colorado.

Mr. NORTHWAY. How many of such persons are there?

Mr. RAWLINS. About fifteen or twenty altogther. I know those people well. The committee has thought proper in this bill to protect the rights of such persons. It is known that there has been a large corporation organized for the purpose of getting possession, if possible, of those asphaltum lands.

I now come to the question propounded to me by the chairman of the Committee on Appropriations [Mr. SAYERS]. In the last Congress a bill was passed by this House and Senate which cut off arbitrarily two tiers of



townships from the eastern portion of the Uncompahgre Reservation, ignoring the rights of the Indians to take allotments upon the lands; and it also contained a provision in these terms:

> *Provided,* That any mineral location heretofore made or attempted to be made on said lands, or any part thereof, by any qualified person, who shall have made the same in good faith, shall bear date and be allowed the same as if said lands had been public lands at the time of said attempted location or institution of said proceedings, but said mineral location shall not be completed except upon the payment of $20 an acre, or at that rate for the amount taken up by the claim; but no claim shall contain more than 160 acres.

You will observe, first, that that does not require the party attempting to locate to have made the discovery of the mineral land, as this bill does. Second, it does not require him to make the location at all. That provision in the mining law is well understood. The party must discover the mineral lands, he must erect his monuments, make his claim, 1,500 feet each way, and he must also define the boundaries of the claim, which must be distinctly marked on the ground, and he can not take, under the operations of this bill, to exceed 10 acres at most under the provisions of the law.

Mr. HOLMAN. And at a price of $50 per acre.

Mr. RAWLINS (continuing). But under the old bill he was only required to make an attempt at location, as the bill which was passed and vetoed by President Harrison provided, and he was also allowed to enter 160 acres and rot required to make any expenditure for the development of the land. On these grounds the President vetoed the bill.

Mr. HOLMAN. And was required to pay ony $20 per acre for the land.

Mr. RAWLINS. Yes; while this requires the payment of $50 per acre.

Mr. SAYERS. If the gentleman will permit me—

Mr. RAWLINS. Let me conclude my statement.

This bill restricts the privilege of making the location, as [7258] contemplated by the law, to the actual discoverer of the mineral deposits, and allows the location of not exceeding 10 acres, for which the party shall pay $50 per acre.

In this case these parties have complied in all respects with the provisions of the mining law and entered the lands when the boundaries of the reservation were not accurately defined. They entered upon the lands in good faith, and this third section of the bill is, in my judgment, rather a restriction than an extension of their rights and privileges, as held by the Supreme Court of the United States in the case of Noonan against the Caledonia Mining Company, where persons went on to a new reservation in the Black Hills prior to the opening of the reservation, and made entry.

Mr. SAYERS. Just in that connection can the gentleman state to the House who constitute the syndicate that are interested in the third section?

Mr. HOLMAN. If that section is proposed to be stricken out, what is the use of wasting time about it?

Mr. LYNCH. We are endeavoring to avoid giving any advantage to speculators.

Mr. SAYERS. But we wish to know who these speculators are, and what their connection is with this bill.

Mr. DOCKERY. Is it agreed that the third section shall be stricken out?

Mr. RAWLINS. I was going on to state, if the gentleman will permit me, in answer to the question which has been propounded, that so far as the third section is concerned, in my judgment, and I have carefully investigated the question, there is absolutely no syndicate involved, and the only persons interested are some fifteen or twenty citizens of Utah and Colorado.



In the last Congress a similar bill was vetoed at the request of the Gilsenite Company of St. Louis. They opposed the bill at that time and brought strong pressure to bear against it. Since then they have changed their minds in connection with the matter, for the reason that they desired to construct a railroad through the Indian reservation to a mining claim which they own and which was vitrually given to them by act of Congress passed in 1881.

Mr. NORTHWAY. Let me ask the gentleman, if the third section is not inserted in the bill, whether whatever rights these parties have will not be sacrificed?

Mr. RAWLINS. Certainly, but—

Mr. SAYERS. They have no rights at all, because they are trespassers.

Mr. RAWLINS. The reason that I am willing to consent to striking it out is that under the decision of the Supreme Court of the United States, which I have already cited and which I have at hand, the people not only who located but who made entries prior to 1890, as they did in this case, are protected, as well as all persons who entered the lands in good faith, made locations, and expended money in improvements, provided they were in possession of the property at the time the reservation is open to settlement. They are protected, and the rights in my judgment, are more enlarged under that decision of the Supreme Court than they are under the third section of the bill.

Mr. BARTHOLDT. If the gentleman will allow me, since St. Louis has been mentioned, I wish to state that there is no connection whatever by anybody in St. Louis with any one of these discoveries. But I wish to say this: That if you strike out section 3, you legislate in favor of corporations and rich syndicates—

Mr. SAYERS. How?

Mr. BARTHHOLDT (continuing). Because any rich syndicate can hire a lot of toughs and through their assistance ride roughshod over the rights of the bona fide

claimants and discoverers. This section affects the rights of some twelve or fifteen poor people, and the only way to protect them is to adopt this section.

Mr. SAYERS. Now, Mr. Chairman, the statement of the gentleman from Missouri is entirely beyond and outside of the language of the third section, and I would like the gentleman to yield to me—

Mr. BARTHOLDT. I wish to make that statement clearer, if I can have time.

The CHAIRMAN. The gentleman from Utah has the floor.

Mr. SMITH of Arizona. Will the gentleman yield to me for a moment?

Mr. RAWLINS. Certainly.

Mr. SMITH of Arizona. I appreciate the motive of my friend from Texas, but it is not an unusual thing in the opening of these reservations in the Western country to find settlements made by bona fide prospectors, men seeking ore in the mountains, who have gone in and got possession by the discovery of minerals, and carried out, as far as possible, the mining laws, believing it to be public land of the United States.

Now, I quite agree with the gentleman that it is a limitation on the power, rather than broadening it or giving any syndicate a chance to steal this land. It looks to me like a limitation on their power, in the light of the decision to which the gentleman has referred, with which all men familiar with the mining laws are somewhat well acquainted. The one suggestion I wish to make to my friend from Texas [Mr. SAYERS] is this, that if these prospectors located in good faith, not knowing this to be a reservation, the lines of the reservation, subsequently covering it, they did all they could to make valid locations, and I do not think the suggestion of the gentleman is just, in the light of what has been said, when he says that a syndicate has hold of it. It seems to me the language of the bill is rather a protection of that property from syndicates, than to allow them to take possession.



Mr. SAYERS. Will the gentleman from Utah allow me five minutes?

Mr. RAWLINS. I will yield to the gentleman five minutes.

Mr. SAYERS. I desire to call the attention of the House to this bill and to show that by the very report of the committee the bill as it is now before the House ought not to pass. The committee in their report say:

> By their agreement of March 6, 1880, these Indians agreed to accept allotments as provided in the substitute bill reported. This agreement was ratified by the act of Congress dated June 15, 1880 (21 Statutes, 199). Under the agreement the Indians were to pay for the lands allotted to them at the rate of $1.25 per acre.

And yet the committee reported in favor of giving these Indians the lands for which they had stipulated, under the treaty, to pay at the rate of $1.25 an acre.

Mr. SMITH of Arizona. A mistaken idea of humanity that the House is constantly going into.

Mr. SAYERS. I ask the chairman of the Committee on Indian Affairs why he did not provide for the purchase of these lands by the Indians?

Mr. HOLMAN. Oh, well, we are adopting a very liberal policy toward these Indians. We took a large body of their lands in Colorado, and we gave them a large body of land, a very considerable body of land, but much less than they had in Colorado, a large portion of which is apparently valueless. It had been agreed that these Indians should pay for the lands assigned them in Utah $1.25 per acre. I admit that this is simply a question as to how liberal Congress should be toward that tribe of Indians.

Mr. SAYERS. Now, Mr. Chairman, when it is borne in mind that the probability is that beneath the surface of some of these lands are minerals which make them as valuable, if not more so, than any lands in the United

States, I think the committee have been exceedingly liberal to these Indians.

Mr. LYNCH. The allotments are confined to agricultural lands.

Mr. HOLMAN. They take only agricultural lands.

Mr. SAYERS. Agricultural lands provided there be a sufficient amount of them.

Mr. LYNCH. There are fifteen times as many acres of agricultural lands as will be needed for this purpose.

Mr. SAYERS. Now, let us read this section 3. If the gentleman agrees to strike it out, I will not refer to it further.

Mr. RAWLINS. I have no objection.

Mr. BARTHOLDT. I object.

Mr. RAWLINS. I suggest to the gentleman from Texas that he let that matter be voted upon by the House.

Mr. SAYERS. Let me read the section:

> SEC. 3. That persons otherwise qualified to make entries who have, in good faith, made mineral discoveries and locations within the limits of said reservation prior to the 1st day of July, 1890—

That is, persons who have gone upon lands that were reserved from location—

> and who have complied with the law in regard to the entry and location of mineral lands as far as practicable—

There was no law authorizing them to locate on any portion of these lands. No gentleman can point out a provision of any statute which authorized these men to go and locate upon them—

> shall, upon the opening of said lands to entry, have the preferred right of entering their respective locations for thirty days next after such opening, but no longer.

Now, I will call the attention of the members to a clause in the veto message of President Harrison. He says:



The object, then of this legislation is to be sought not in any public demand for these lands for the use of settlers—for if they are susceptible of that use, the Indians have a clear equity to take allotments upon them—but in that part of the bill which confirms the mineral entries, or entries for mineral uses, which have been unlawfully made "or attempted to be made on said lands." It is evidently a private and not a public end that is to be promoted. It does not follow, of course, that this private end may not be wholly meritorious, and the relief sought on behalf of these persons altogether just and proper. The facts, as I am advised, are that upon these lands there are veins or beds of asphaltum or Gilsonite, supposed to be of very great value.

Entries have been made in that vicinity, but upon public lands, which lands have been resold for very large amounts. It is not important perhaps that the United States should in parting with these lands realize their value, but it is essential, I think, that favoritism should have no part in connec [7259] tion with the sales. The bill confirms all attempted entries of these mineral lands at the price of $20 per acre (a price that is suggestive of something unusual) without reqiring evidence of the expenditure of any money upon the claim, or even proof that the claimant was the discoverer of the deposits.

The bill requires "good faith," but it will be next to impossible for the officers of the Interior Department to show actual knowledge on the part of the claimant of the lines of the reservation. The case will practicably be, as to this matter, in the hands of the claimant. But why should good faith at the moment of attempting the entry, without any requirement of expenditure, and followed, it may be, within twenty-four hours by actual notice that he was upon a reservation, give an advantage in the sale of these lands that may represent a very large sum of money?

That is what President Harrison said when he vetoed a bill similar to the third clause in the bill.

Mr. LYNCH: Mr. Chairman, I want to say that section 3 was inserted as a matter of justice and right, and with abundant precedent. It came to the knowledge of the committee that about the year 1889 or 1890 this asphalt mineral was discovered by prospectors, men of nerve and energy, who went there of their own accord, believing they were on the public lands. They made their discoveries in good faith, marked out their mineral allotments, and recorded their entries in Colorado, believing the land was in that State.

Afterwards it was discovered that the State line between Colorado and Utah ran further east, and they were found to be on this reservation. That was the condition of things as represented to the committee. It was also represented that there were not exceeding eight, ten, or fifteen, at the outside, of these discovers.

By striking out this section you deprive those brave, hardy discoverers of the fruits of their honest labor and luck, and that without any justification.

The committee thought as a matter of good faith, as a matter of justice, and as a reward for their having made this discovery, by which this country has been benefited millions of dollars, the rights of these men should be protected; I am willing to limit the number of these men to twenty-five. There is not that number, but to be safe, from all the information of the committee, that number would cover all meritorious entries.

Mr. SAYERS. You say there are ten or fifteen? Why should you desire to limit it to twenty-five?

Mr. LYNCH. I would be willing to limit it to fifteen of the early discoverers. Our information is of a less number.

Mr. WARNER. Will the gentleman allow me to ask him a question.

Mr. LYNCH. Certainly.



Mr. WARNER. May I ask if the amount of money that the United States will get in any case is at all affected by this amendment?

Mr. LYNCH. Not at all.

Now, as to the other proposition about their having that land. It is a matter of indifference to the committee what action the House may take. These Indians were placed upon that land in 1880. They have lived there continuously since. They regard that as their own property. They are self-sustaining. They are not costing the Government a dollar, and it was the opinion of the committee that, with the belief resting in the minds of these Indians that they owned that land, that in disposing of them it was reasonable and fair to say to them, "Go and take your allotments of 200,000 acres out of 1,900,000, and go and support yourselves out of what you have." If we take pay for land out of the moneys they have, it makes them all the more liable to come back on the Government for support. It was the judgment of the committee that so long as this tribe was self-sustaining it was in the interest of harmony to treat them in this way.

That was the reason for the action of the committee. The committee is wholly indifferent, and is perfectly willing to take the judgment of the House as to whether they shall pay for the land or not. None of us care a straw one way or the other except in the interest of peace and fair play, because by taking that land and requiring them to make payment for it, it might make a disturbance that would cost very much more than it would to give them the land.

Mr. CANNON of Illinois. How much is there in the Treasury to the credit of these Indians under the treaty made for the purchase of their former reservation?

Mr. LYNCH. Seventeen hundred thousand dollars, which belongs to the three tribes—about 2,000 persons.

Mr. CANNON of Illinois. What part of it belongs to these Indians?

Mr. LYNCH. Nearly half.

Mr. CANNON of Illinois. Eight hunrded and fifty thousand dollars, under the treaty.

Mr. LYNCH. Perhaps.

Mr. CANNON of Illinois. I want to see if I understand the matter right. They parted with their Colorado land for eight hundred and odd thousand dollars?

Mr. LYNCH. Yes.

Mr. CANNON of Illinois. And agreed to pay for their allotment in severality later on in the course of time at $1.25 per acre out of the $800,000. Now, the gentleman says they are self-sustaining, and I am glad to know they are. Has the gentleman thought of the influence upon these Indians, who have manhood and who are self-sustaining, of receiving a gift, not something out of their rights under the law, for which they are subject to pay? The white fellow can not stand that very well. It would tend to demoralize him. Will it not tend to demoralize self-sustaining Indians to go and take something for nothing?

Mr. LYNCH. This is the first instance of this kind we have had in any treaty to my knowledge, or that I have heard.

Mr. SAYERS. They were paid for their land in Colorado.

Mr. HOLMAN. That was a very large body of land.

Mr. SAYERS. But they were paid for it.

Mr. HOLMAN. A mere nominal sum.

Mr. CANNON of Illinois. If the gentleman will allow me. It is not the amount of money involved. That is not the question at all, but it is the risk you run when you have a small handful of Indians, like the Navajoes in Idaho, who are self-sustaining, and who are working out their own salvation, of putting something into their hands for nothing. I say that would tend to demoralize and pauperize white people. Maybe the Indians have character enough to stand it.

Mr. HOLMAN. It will not affect the Navajoes. We are appropriating money for their support all the time.



Mr. CANNON of Illinois. And are tending to demoralize them in doing so.

Mr. LYNCH. You have either got to do that or have them liable to become a Government charge again. The land to be allotted to them is neither all good nor all bad. Millions of acres of the same kind of land ajoins this reservation which has been subject to entry for years, but no white man seems to want it even as a gift. The land is more or less mountainous, and can only be used by means of irrigation.

Mr. WILLIAM A. STONE. You have got to feed them anyhow.

Mr. LYNCH. We do not feed them. We have not paid a dollar for their support for years.

Mr. WILLIAM A. STONE. But they get the interest on this money which does feed them.

Mr. LYNCH. I am only submitting the judgment of the Committee on Indian Affairs as to the best policy to be pursued with these Indians. If the judgment of the House is different, none of us will find any fault. Whether you approve or disapprove our action is wholly immaterial to the committee. It seemed to us wise not to disturb these Indians in their rights—not to provoke any uprising such as would be liable to happen if their annual income should be decreased.

We consider that they are doing very well, and we should be satisfied to let them alone. Requiring them to pay the fixed price for that land, which is more than double its actual value, when taken as a whole, may provoke disturbances or a feeling of hostility that would in a short time cost more than the value of the lands. They sold about 6,000,000 acres in Colorado in 1880 for $800,000, and a third of that will be taken back for one-thirtieth of the quantity of land of practically the same kind and value.

Mr. RAWLINS. I ask that we now proceed to consider the amendments.

Mr. SAYERS. I desire to move to strike out the third section.

The CHAIRMAN. General debate is not closed.

Mr. RAWLINS. I ask unanimous consent that general debate be closed, and that the bill be considered under the five-minute rule.

There was no objection.

The Clerk proceeded to read the bill when—

Mr. LYNCH. I ask unanimous consent that the reading of the bill by sections be omitted, and that amendments may be offered to any part of the bill at this time.

The CHAIRMAN. As though the bill were being considered in the House?

Mr. LYNCH. Yes, sir.

There was no objection.

Mr. WILLIAM A. STONE. I offer the amendment which I send to the desk.

The Clerk read as follows:

> After the word "location," in line 22 of page 2, insert:
>
> "*And provided,* That said Indians shall pay $1.25 per acre for said lands from the fund now in the United States Treasury realized from the sale of their lands in Colorado, as provided by their contract with the Government."

The amendment was agreed to.

Mr. SAYERS. I move to amend by striking out section 3.

The question being taken, there were on a division (called for by Mr. SAYERS)—ayes 9, noes 16.

[7260] Mr. SAYERS. No quorum.

Tellers were ordered; and Mr. SAYERS and Mr. LYNCH were appointed.

Mr. RAWLINS. Rather than imperil the bill, I ask that this third section be stricken out by unanimous consent.

Mr. HOLMAN. I hope it may be agreed that the third section be stricken out. I am very confident that



under the state of the law as it has been construed by the Supreme Court, the rights of these persons, if they have any rights, will be protected at any rate. I hope there will be no objection to striking out this section.

The CHAIRMAN. Pending the count by tellers the gentleman from Indiana asks that the third section of the bill be struck out. Is there objection? The Chair hears none; and it is so ordered. The Chair will treat the amendment of the gentleman from Texas and the point of no quorum as withdrawn.

Mr. RAWLINS. I offer the amendment which I send to the desk.

The Clerk read as follows:

> Strike out all after the word "interior," in line 6, page 4, and insert in lieu thereof:
>
> "*Provided,* That the cost of executing the provisions of this act shall not exceed the sum of $16,000, which sum is hereby appropriated for that purpose out of any money in the Treasury not otherwise appropriated."

Mr. LYNCH. The committee will not object to that amendment.

Mr. PICKLER. What is the object of the amendment?

Mr. HOLMAN. I move to amend the amendment by striking out "sixteen thousand" and inserting "eight thousand."

Mr. RAWLINS. If the amendment of the gentleman from Indiana [Mr. HOLMAN] be adopted we might just as well not pass the bill. This matter was submitted to the Department for an estimate as to the amount which would be necessary; and after obtaining such an estimate, the Chairman of the Committee on Appropriations, to whom the matter was submitted, agreed on behalf of his committee that $16,000 should be the amount appropriated. By throwing open these two reservations amounting to about 4,000,000 acres of land, there will be restored to the public domain about 3,500,000 acres.

Mr. HOLMAN. Not by this bill.

Mr. RAWLINS That will be the ultimate result. It will bring into the Treasury of the United States, in my judgment, millions of dollars.

Mr. PICKLER. Is it not probable that within thirty days the filing fees will be very much larger than this sum?

Mr. RAWLINS. Unquestionably.

Mr. PICKLER. If there is any amount of land taken, that will certainly be so.

Mr. HOLMAN. Mr. Chairman—

Mr. PICKLER. I am opposed to the reduction to $8,000—

The CHAIRMAN. The gentleman from Indiana has been recognized.

Mr. HOLMAN. The expense attending the allotments of land in severalty to the Indians, and the disposal of what remains after the allotments are completed have necessarily involved very considerable expense to the Government. I have no doubt myself that $15,000 will not be required—

Mr. NORTHWAY. Then the Government will not expend it.

Mr. HOLMAN. Oh, yes it will, if appropriated.

Mr. SAYERS. I have no doubt that the whole amount will be required.

Mr. HOLMAN. But I was going on to say, in view of the opinions of members of the Committee on Indian Affairs, who have investigated this matter more fully than I have, and especially with reference to the chairman of the subcommittee, who has examined it very thoroughly and carefully—Mr. LYNCH, chairman of the subcommittee—who thinks the amount will be required, I will not press the motion. But the extravagance all along the line of this Indian business ought to be retrenched.

I withdraw the amendment.



The CHAIRMAN. Then the question is on agreeing to the amendment proposed by the gentleman from Utah, which has just been read.

The motion was agreed to.

Mr. LYNCH. I move that the committee rise and report the bill as amended favorably to the House.

The amendment was agreed to.

The committee accordingly rose; and the Speaker having resumed the chair, Mr. DOCKERY reported that the Committee of the Whole House on the state of the Union, having had under consideration the bill H. R. 6557, had directed him to report the same to the House with sundry amendments, and with the recommendation that as so amended it do pass.

Mr. LYNCH. I ask the previous question on the amendments and on the bill to its passage.

The previous question was ordered, under the operation of which the amendments were agreed to, and the bill as amended ordered to be engrossed and read a third time; and being engrossed, it was accordingly read the third time, and passed.

On motion of Mr. LYNCH, a motion to reconsider the last vote was laid upon the table.

* * * *

**Act of August 15, 1894, 26 Stat. (LD 35)**

SEC. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands according to the treaty of eighteen hundred and eighty, as follows:

"Allotments in severalty of said lands shall be made as follows: To each head of a faimly one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each other person under eighteen years of age, born prior to such allotment, one-eighth of a section, with a like quantity of grazing land: *Provided,* That with the consent of said commission, any adult Indian may select a less quantity of land, if more desirable on account of location:" *And provided,* That the said Indians shall pay one dollar and twenty-five cents per acre for said lands from the fund now in the United States Treasury realized from the sale of their lands in Colorado as provided by their contract with the Government. All necessary surveys, if any, to enable said commission to complete the allotments shall be made under the direction of the General Land Office. Said commissioners shall, as soon as practicable after their appointment, report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.

SEC. 21. That the remainder of the lands on said reservation, shall, upon the approval of the allotments



by the Secretary of the Interior, be immediately open to entry under the homestead and mineral laws of the United States: *Provided,* That no person shall be entitled to locate more than two claims, neither to exceed ten acres, on any lands containing asphaltum, gilsonite, or like substances: *Provided,* That after three years actual and continuous residence upon agricultural lands from date of settlement the settler may, upon full payment of one dollar and fifty cents per acre, receive patent for the tract entered. If not commuted at the end of three years the settler shall pay at the time of making final proof the sum of one dollar and fifty cents per acre.

SEC. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress.

* * * *

**H.R. Doc. No. 191, 54th Cong., 1st Sess. (1896) (LD 39)**

HOUSE OF REPRESENTATIVES

54th Congress, *1st Session.* — Document No. 191

# UNCOMPAHGRE INDIAN RESERVATION

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## LETTER

FROM

## THE SECRETARY OF THE INTERIOR,

TRANSMITTING

*Certain information as to the proceedings of his Department in carrying out the provisions of sections 20, 21, and 22 of an act making appropriations for expenses of the Indian Department, approved August 15, 1894; and also relating to certain lands in the Uncompahgre Indian Reservation in Utah.*

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FEBRUARY 1, 1896.—Referred to the Committee on Indian Affairs and ordered to be printed.

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DEPARTMENT OF THE INTERIOR,
*Washington, January 30, 1896.*

SIR: I have the honor to acknowledge the receipt of the following resolution of the House of Representatives, dated 16th instant:

> *Resolved,* That the Secretary of the Interior is hereby requested to inform the House in detail as to the proceedings had and expenditures made by his Department in carrying out the provisions of sections 20, 21, and 22 of an act making appropriations for current and contingent expenses of the Indian Department, etc., approved August 15, 1894; with the names and residences of commissioners appointed under the provisions of said sections; with copies of instructions given by his Department to said commissioners, and with a statement, if not incompatible with the public service, of the probable time when that provision of said sections can be executed which provides for a restoration to the public domain of certain lands within the Uncompahgre Indian Reservation, in the Territory of Utah.



In response thereto, I transmit herewith copy of a communication of the 21st instant from the Commissioner of Indian Affairs, and its inclosures, to whom the matter was referred.

I also transmit copies of the reports of the commission, referred to in the Indian Office letter, dated January 8 and December 21, 1895.

It seems from these papers that there is not within the limits of the Uncompahgre Reservation sufficient agricultural or grazing lands to provide those Indians with allotments, and that even if the lands were there the Indians will not agree to take allotments with the condition attached that they should pay $1.25 per acre therefor. These reports contain a full statement of all the facts in this matter, and contain some strong arguments in favor of relieving the Indians of the payment of $1.25 per acre for land taken by them as allotments.

I am of the opinion that further negotiations should be had with the Indians on the Uncompahgre Reservation upon the lines indicated by the Commissioner of Indian Affairs.

I transmit herewith a copy of a recent report from the acting agent in charge of these Indians, giving some fur-

ther facts as regards the present condition of affairs on these reservations.

Very respectfully,

HOKE SMITH,
*Secretary.*

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS
*Washington, January 21, 1896.*

SIR: I have the honor to acknowledge the receipt, by Department reference for immediate report, of the following resolution of the House of Representatives, adopted January 16, 1896:

> *Resolved*, That the Secretary of the Interior is hereby requested to inform the House in detail as to the proceedings had and expenditures made by his Department in carrying out the provisions of sections 20, 21, and 22 of an act making appropriations for current and contingent expenses of the Indian Department, etc., approved August 15, 1894, with the names and residences of commissioners appointed under the provisions of said sections; with copies of instructions given by his Department to said commissioners, and with a statement, if not incompatible with the public service, of the probable time when that provision of said sections can be executed which provides for a restoration to the public domain of certain lands within the Uncompahgre Indian Reservation in the Territory of Utah.

In reply, I have the honor to state that under date of November 28, 1894, S. S. Scott, of Uchee, Ala., William S. Davis, of Little Rock, Ark., and Timothy A. Byrnes, of Atlantic City, N.J., were appointed commissioners "to allot lands to the Uncompahgre Indians in Utah according to the treaty of 1880, and to negotiate with the Indians of the Uintah Reservation in Utah for the relinquishment of certain lands in both cases under the provisions of the act of Congress approved August 15, 1894."



Under date of December 7, 1894, instructions for the guidance of this commission in the discharge of its duties were prepared and submitted to the Department, which instructions were approved by the Secretary December 8, 1894.

December 10, 1894, copies of these instructions were handed Messrs. Scott and Davis, and a copy mailed to Mr. Byrnes, at the Uintah Agency.

Under date of January 8, 1895, the commissioners submitted a report relative to the progress of their work on the Uncompahgre Reservation, and referred to the provisions in the act of June 5, 1880 (21 Stat. L., 199), ratifying the agreement with the Ute Indians, which requires the Uncompahgre Indians to pay $1.25 per acre for the lands allotted them.

They stated that the Indians were unable to see why they should be required to pay for their allotments while the Uintahs living alongside them were not required to make this payment. They (the commissioners) anticipated great difficulty in satisfactorily explaining this matter to the Indians, and suggested whether it would not be best for the Government to relieve the Uncompahgres of this payment.

In reply the commissioners were advised, under date of February 4, 1895, that I had submitted a copy of their report, together with the report of Major Randlett, acting Indian agent, addressed to them upon the same subject, to the Department, with recommendation that the same be transmitted to the Senate Committee on Indian Affairs with request that a section be added to the Indian appropriation bill the effect of which would be to relieve the Indians of this payment.

I added that I did not know whether there would be any chance of obtaining this legislation, but that they would be able to assure the Indians that they had done all in their power to relieve them of this requirement, and that this office had cooperated with the commission in this matter.

Under date of March 22, 1895, the commissioners submitted the following statement:

> Your letter of the 15th instant was received by last mail. In it you state that 'the Secretary of the Interior is desirous of knowing how soon a report may be reasonably expected from you as to 'what portions of said reservation (Uncompahgre) are unsuited or will not be required for allotments,' as contemplated by section 20 of the act of August 15, 1894, under which you are operating."
>
> The commision begs to say in reply that no exploration of the reservation has been possible since it reached this place. The snow has been of such depth as utterly to prevent all travel over the reservation; and even had such travel been practicable no fair idea could have been formed as to the character of lands so heavily coated, as they have been, with snow. This covering is, however, at last beginning to disappear, and although it is still, judging from the outlook in the vicinity of this place, at considerable depth in certain portions of the reservation, it is supposed that the way will be sufficiently open for the commission to undertake the exploration required within a few days. It is thought, too, that this work can be finished in three or four weeks. You may be sure that it will be pushed with due rapidity. Immediately upon its completion a report will be forwarded embracing the information desired.

Under date of May 6, 1895, the commissioners submitted a report as to "what portions of said reservation"



(the Uncompahgre) "are unsuited or will not be required for allotments," and which under the provisions of the act of August 15, 1894, were by proclamation to "be restored to the public domain and made subject to entry."

June 3, 1895, this report was submitted to the Department, with a description by legal subdivisions of the lands which might be restored.

On the 19th of August, 1895, Commissioner Davis died, and his place has not been filled.

December 21, 1895, Commissioners Scott and Byrnes submitted a report, in which they stated substantially that it was impossible to induce the Uncompahgres to take allotments in severalty as contemplated by the act of August 15, 1894, in view of the requirement that they must pay $1.25 per acre for any and all lands allotted them.

Under date of January 14, 1896, I submitted this report to you, and after discussing the matter at some length and reviewing the work of the commission up to that time, remarked that the following questions suggested themselves:

> (1) Shall the commission make any further effort to induce the Uncompahgres to take allotments in severalty under existing conditions?
>
> (2) Is it your desire that they shall make further report of lands not suited or required for allotment, in order that such lands may be restored to the public domain?
>
> (3) Shall the commission suspend work among the Uncompahgres and proceed to negotiate with the Indians of the Uintah Indian Reservation for the relinquishment to the United States of the interest of said reservation not needed for allotments in severalty to said Indians, and if possible procure the

consent of said Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty within said reservation, etc.?

I also suggested that the best way out of the difficulties met with in carrying out the present law would be to obtain some such legislation as the following:

> To enable the Secretary of the Interior to negotiate with the Uncompahgre tribe of Indians and with the Indians residing on the Uintah Indian Reservation, in Utah, for such modification of existing treaties and agreements with said Indians and such change in their reservations as may be deemed desirable by said Indians and the Secretary of the Interior, —— thousand dollars, or so much thereof as may be necessary; but no agreement made shall take effect until ratified by Congress.

The expenditures by the commission, including the sum of $1,403 advanced for the present quarter, amount to $14,440.45.

In reporting on the resolution I have not confined myself strictly to its terms, but have also given in brief the action taken by this office in carrying out the provisions of the act of August 15, 1894.

In view of the recommendations contained in office reports of June 3, 1895, and January 14, 1896, which have not yet been acted upon by you, I have not deemed it advisable to express any opinion as to "the probable time when that provision of said sections can be executed which provides for a restoration to the public domain of certain lands within the Uncompahgre Indian Reservation in the Territory of Utah."

I inclose copies of the letter of instructions given the commission, its report of January 8, 1895, of the report of this office thereon of January 26, 1895, of the report of this office dated June 3, 1895, and of office report of January 14, 1896.



The reports of the commission of May 6, 1895, and December 21, 1895, are in your office.

Very respectfully, your obedient servant,

D. M. BROWNING,
*Commissioner.*

The SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,
COMMISSION FOR ALLOTMENT OF LANDS TO INDIANS IN UTAH,
*Fort Duchesne, January 8, 1895.*

SIR: The undersigned, Messrs. Scott and Davis, Ute Indian commissioners, with Mr. Edelin, clerk, reached this place on the morning of the 21st ultimo. They found Mr. Byrnes, the other commissioner, whose name is also underwritten, here awaiting them. A meeting of the commission was held on the following day, and the Commissioner of Indian Affairs was promptly advised of its organization and that it was in the field marked out for its future operations.

The ground was covered with snow, and until within the last few days snow has fallen almost every day or night since. The weather, too, has been at times intensely cold, the mercury in the thermometer at the post frequently sinking as low as zero and now and then from 10° to 20° below that point. Outdoor work on the part of the commission has been almost entirely impracticable, and indeed it is feared at this writing—the thermometer registering 24° below zero—that much of this kind of work will continue to be so until the coming in of spring. All, however, that can be done to facilitate the object had in view by the appointment of the commission in preparing for fieldwork when the time arrives for it has been done and will continue to be done faithfully and energetically.

The commission has had morning and afternoon meetings daily and has made honest efforts to arrive at a full comprehension of the very grave, delicate, and responsible duties with which it has been charged by the Government. It has read and reread, weighed, considered, and discussed the law approved August 15, 1894, under which it was organized; the instructions, dated the 7th ultimo, furnished for its guidance; the Ute Indian treaties of 1873 and 1880, and the acts of Congress ratifying the same; and all other public documents intrusted to it, or which could be reached, referring to the business in hand with the view of obtaining a clear understanding of the whole matter, in order that it might be ready not only to reply promptly and intelligently to every question on the subject propounded to it by the Indians, but be enabled to push the work to completion at the earliest practicable moment.

As a further preliminary movement in the direction suggested it was resolved by the commission to detail Commissioner Byrnes, who by long official association with the Uncompahgre Utes had secured their friendship and confidence, to visit the Ouray Agency and by informal conference with their chiefs and head men ascertain what was their understanding of the agreement entered into by them in conjunction with the other leading men of the confederated band of Utes at Washington City and subsequently ratified by them as part of said confederated band in a vote of three-fourths of the whole male adult population and known as the agreement of 1880. This step was taken because in communicating with Major Randlett, of the United States Army and acting agent for both the Uncompahgre and Uintah Utes, it was learned that there was much dissatisfaction among the former by reason of the failure on the part of the commissioners selected to treat with them under the act of 1880 to strictly carry out their instructions in removing them from their old reservation in Colorado; and again, because of the provision in the law of August 15, 1894—the one under which the present commission acts—



requiring them to pay $1.25 per acre out of their annuity funds for the lands to be allotted to them.

It may be well to state that Major Randlett understands these Indians well—he is most emphatically their friend, as they are without an exception his friend—and that he has embodied the foregoing facts in a letter to the commissioner, dated the 24th ultimo and received the 7th instant, which communication was at once referred to the Commissioner of Indian Affairs.

Commissioner Byrnes, in pursuance of the resolution referred to, proceeded to the Ouray Agency. The time and character of his work there is fully made known in the following subreport:

FORT DUCHESNE, UTAH,
*January 7, 1895.*

The UTE INDIAN COMMISSION.

GENTLEMEN: Pursuant to resolution dated December 31, 1894, I left this place on Friday last at 1 o'clock p.m. for the Ouray Agency and arrived there at 5 o'clock p.m. The following day, Saturday, January 5, being issue day, the Indians were present in large numbers. The chiefs and head men were all present. They had no knowledge of my being at the agency at that time. I carefully concealed the object of my visit, and concluded that it would be best to have all the Indians assemble at one time and state to them in each other's presence the object of my mission, so that I could be fully understood by all.

I concluded that this would be a better mode of procedure than questioning them separately. I therefore gave notice that all the male adult Indians should meet me at the agency office at 3 o'clock in the afternoon; that I desired to talk with them. Promptly at that hour 125 adult Indians, with Charley Albandra, the interpreter, had assembled at the office and notified me by the interpreter that they were ready to hear me talk. I invited Mr. John McAndrews, chief herder at this agency, who understands the Ute language, and Mr. Howard I. Brother, the clerk

in charge of the agency, to be present as witnesses to the proceedings. I then asked the Indians for the information required. They seemed to be very much astronished at the questions I asked. It seemed that I had taken them by surprise. However, they quickly responded as follows, which I noted down at the time: They said that they never agreed to come to this country, but were promised that they should remain in Colorado and be settled on the Grand River, near the mouth of the Gunnison, which they were promised they should be given houses and farms and helped to live like the whites. They said that they never agreed to pay $1.25 an acre for the lands they were to receive in exchange for the reservation in Colorado, and they never heard of such agreement until now; that the whites about here have lately been telling them about this, but they did not believe it until I told them that it was so. They seemed much surprised at this, and asked me to have the commission write to Washington and tell him this was wrong, and ask Washington to have them treated right.

All the Indians present were signers of the treaty of 1880. All the chiefs and headmen were present. Among those who were present and whose names I recollected are the following, which names I took down rapidly as they passed out:

| | | |
|---|---|---|
| Charley Chavanah. | Ash ta. | Gus. |
| Red Moon. | Ignacio. | Galota. |
| Charley Alhandra. | Wyasket. | Wee ma mooch. |
| Eggleston. | Ac cut ti pe noots. | Piah. |
| Quo nah ag. | New cow ree. | Arrappo. |
| Guo na tach. | Wass. | Atchee. |
| Snaps. | Little Jim. | Tom. |
| Henry Wilson. | Yon a gats. | Wa rat za. |
| Wap pa nah. | Pantalane. | Wa pe ratz. |
| Elk. | Arrive. | Yah pootz. |
| Chick i too Cohoe. | Pow a chitz. | Char oo. |
| Buckskin Jim. | Kan op atch. | Wap pe nas. |
| Fenno. | Johnson Smith. | Jack Johnson. |
| My yore. | | |



Having attended to the duties required of me, I returned to Fort Duchesne the next day, Sunday, 6th instant.

Respectfully submitted.

T. A. BYRNES,
*Commissioner.*

No comment is required here upon the foregoing subreport of Commissioner Byrnes. It is quoted for the benefit of the Indian Office, which will give it such consideration as it deserves. The commission, however, beg leave, in this connection, to call attention to the third section of the act of 1880 ratifying the Washington agreement. That section reads as follows:

"SEC. 3. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement to secure the settlement in severalty of said Indians as therein provided. And upon the completion of said survey and enumeration herein required the said commissioners shall cause allotments of lands to be made to each and all of the said Indians, in quantity and character as set forth in the agreement above mentioned, and whenever the report and proceedings of said commissioners, as required by this act, are approved by the President of the United States, he shall cause patents to issue to each and every allottee for the lands so allotted, with the same conditions, restrictions, and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said agreement of the Confederated Bands of the Ute Indians and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided,*

That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law, but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the Government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre, which may be cedede to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury, as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act: *Provided,* That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law, but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the Government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre, which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury, as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall bedistributed annually to them in the same manner as the funds provided for in this act: *Provided further,* That the subdivisions upon which are located improvements to be appraised, as provided for in section two of this act, shall be offered to the highest bidder at public sale, after published notice of at least thirty days by the Secretary of the Interior, and the same shall be absolutely reserved from occupation or claim until so sold."



Now, it is not at all surprising that ignorant Indians like the Uncompahgres should have supposed that a reservation which, according to law, it is true, is only theirs for temporary occupancy was given them just as the Uintah Reservation had been given to a brother band of Utes in their immediate neighborhood. The nice distinction between the modes by which the two reservations were established they would hardly be able to draw or understand. And it is still less surprising, in the light of that fact, that they should have been unable fully to comprehend the scope of the section which has just been quoted, especially as all the information they could get with regard to it had to reach them through the imperfect and uncertain medium of an interpreter.

But there is no wish, of course, to discuss the question of right in this paper. That has been settled. The question which is now presented to the Government, and to which is expected a favorable answer, is purely one of policy. Is it best for the Government and best for these Indians that the latter should be made to pay $1.25 per acre for the lands that are to be allotted to them by the present commission? In suggesting a reply to that question, the commission begs most respectfully to say, first, that in its opinion, based not only upon the report of Commissioner Byrnes, but upon statements made to it by Major Randlett and other reliable parties in the vicinity of these agencies, it will be no easy matter to induce the Uncompahgres to accept of allotments of lands upon the terms indicated.

It begs to say further that, on account of this difficulty, joined with the possible and perhaps probable misunderstanding on the part of these Indians of the full meaning of that third section, it would, in its humble judgment, be better for the Government to waive all right to the $1.25 per acre, and let them have the lands to be allotted to them free of all compensation whatever; and it makes this respectful suggestion the more readily because it is satisfied that the present Government of the United States, with a

knowledge of all the facts of the case, could not and would not allow even the smell of harsh dealing toward these Indians, who have shown themselves so willing heretofore to accede to its demands and comply with its wishes, to hang for an instant about its garments. This position of the commission is in harmony with that of both of the committees on Indian affairs in Congress, as is evident from their reports made—that of the Senate committee, May 29, and that of the House committee, April 4, 1894. From the former report are taken the subjoined paragraphs:

"Amend section 1 by adding after the word 'location,' in line 22—

" '*And provided further,* That the stipulation contained in the treaty with the Ute Indians, ratified by act of Congress June 15, 1880, whereby the said Indians are obligated to pay for the lands allotted to them in severalty, be, and the same is hereby, waived by the United States, and the allotments provided for by this act shall be made without any price to be paid or charge to be made against any funds to the credit of the Indians.'

"The reason for recommending this amendment," the committee goes on very forcibly to remark, "is that an effort to enforce the stipulation of the treaty of 1880 at this date would doubtless cause irritation on the part of the Indians, and might provoke resistance. While under the terms of that treaty a charge of $1.25 per acre might be made against the funds of the Indians for the areas allotted to them, the fact remains that this obligation is very imperfectly, if at all, appreciated by the Indians, and that they have from their long residence upon their present reservation acquired a conviction that the lands belong to them.

"In the twelve or fourteen years which have elapsed since the removal of the bands from their aboriginal seat in Colorado a new generation has come into the active management of tribal affairs and to many of the band the



treaty of 1880 is only a tradition, while occupancy of the Utah Reservation is a present fact. It is obviously quite natural, however unreasonable, that the Indians should feel themselves entitled to hold the existing reservation and should object to making payment for the fraction of that reservation which they will be allowed to retain. Under these circumstances, it is submitted that it is a wiser policy to waive the right of the Government to payment for the lands allotted than to incur the friction, delay, and possible strife which might follow an effort to enforce the letter of the treaty."

The commission has been sent here to do a particular work, and to that end the duty has been imposed upon it to communicate to the Government all facts that it may gather affecting the success to the undertaking. This duty it is now attempting in part to discharge; and in connection with that duty, and from the facts hereinbefore given, it has no hesitation in respectfully asking the Commissioner of Indian Affairs, and through him the Secretary of the Interior, to request Congress to amend the act of August 15, 1894, by which these Indians are required to pay the treaty-stipulated price of $1.25 per acre for the lands which may be allotted to them in accordance with its provisions.

If the Government should decide against waiving this right, the commission, undismayed by the grave and manifold difficulties of the situation, will do its best, as indeed it is now doing, in the line of its sworn duty, to induce these Indians to take homes and try to make of themselves a useful and self-supporting people. But it is to be hoped, and in truth it is believed, that the Government will consent to the waiver suggested. Should it do so, it will smooth the way for the commission to make arrangements to provide these Indians with lands upon which they can live and prosper; in a word, become in a few years settled, contented, thriving, as much so as any of their aboriginal brethren within the limits of the United States. There is no exaggeration in this statement. One has but

to see these Indians, note their intelligence, their love of home and family, when they have a home and family, their peaceful and industrious habits and their splendid physique, to be convinced of the truth of what is here claimed for them.

Respectfully submitted.

S. S. SCOTT,
T. A. BYRNES,
WM. S. DAVIS,
*Ute Indian Commission.*

HON. D. M. BROWNING,
*Commissioner of Indian Affairs, Washington, D.C.*

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS
*Washington, January 26, 1895.*

SIR: Under date of January 8, 1895, the Ute Commission submitted a report relative to the progress of their work on the Uncompahgre Reservation. The commissioners refer to the provision in the act of June 5, 1880 (21 Stats., 199), ratifying the agreement with the Ute Indians, which requires that the Uncompahgre Indians shall pay $1.25 per acre for the lands allotted them, and state that these Indians are unable to see why they should be required to pay for the lands to be allotted them while the Uintahs living alongside of them are not required to make this payment. They anticipate great difficulty in satisfactorily explaining this matter to the Indians, and suggest whether it would not be best for the Government to relieve the Indians of this payment. They say:

"In the twelve or fourteen years which have elapsed since the removal of the bands from their aboriginal seat in Colorado a new generation has come into the active management of tribal affairs and to many of the band the treaty of 1880 is only a tradition, while occupancy of the Utah Reservation is a present fact. It is obviously



quite natural, however unreasonable, that the Indians should feel themselves entitled to hold the existing reservation and should object to making payment for the fraction of that reservation which they will be allowed to retain. Under these circumstances it is submitted that it is a wiser policy to waive the right of the Government to payment for the lands allotted than to incur the friction, delay, and possible strife which might follow an effort to enforce the letter of the treaty."

They further state that if the Government should decide against waiving this right "the commission, undismayed by the grave and manifold difficulties of the situation, will do its best—as indeed it is now doing, in the line of its sworn duty—to induce these Indians to take homes and try to make of themselves a useful and self-supporting people. But it is to be hoped, and in truth it is believed, that the Government will consent to the waiver suggested. Should it do so, it will smooth the way for the commission to make arrangements to provide these Indians with lands upon which they can live and prosper; in a word, become, in a few years, settled, contented, thriving—as much so as any other aboriginal brethren within the limits of the United States."

I am also in receipt of a copy of a communication addressed by Maj. James F. Randlett, U.S.A., acting Indian agent in charge of the Uncompahgre and Uintah Utes to the commission, under date of December 24, 1894, upon the same subject. Major Randlett refers at length to the agreement of 1880 and the act by which it was ratified, and the operations of the commission appointed under said act to carry it into effect. He also refers to the wrong committed upon the Uncompahgre Indians by the commissioners charged with removing them to the Grand River, and the failure of the Government to furnish them with houses, wagons, agricultural implements, saw and grist mills, etc., and, as agent for the Indians, informs the present commission that it will be a hard task for them to convince the Indians that it is just

to hold them to the stipulation of the agreement of 1880 for payment of their allotments while the said agreement has been violated in numerous ways by the Government, and concludes as follows:

"I presume you will consider it to be your first duty under the law to ascertain what lands can be cut off from the reservation as not wanted for allotment, and as you will experience much difficulty and delay in accomplishing this, on account of the extent of the reservation and the very small quantity of agricultural land to be found within its limits, I beg that you will consider the question herein raised for the purpose of securing more liberal and just dealing with these Indians from the Government, and that if my conclusions are deemed correct, and you can find it consistent to do so, I pray that you will present the subject for the consideration of the honorable Secretary of the Interior to the end that Congress may be asked to repeal the clause in the act of August, 1894, requiring $1.25 per acre for lands to be allotted to them, and to make the necessary appropriations for supplying them with houses and agricultural implements, and in building substantial and complete irrigating ditches, so that it may be reasonable to expect them to become self-supporting. As agent for these Indians it is my determination to cooperate with you with due sense of my duty to the Government and the obedience I owe to the law of the land, while at the same time I will hope that our work may be carried on in such manner and to such end that no further injustice may come to these poor man-cursed fellow-creatures, and that our efforts for fair dealing with all concerned will be approved by the authority that has intrusted us, and result in reclaiming these Indians from barbarism and ultimately establishing them in ways of right living as American citizens."

The provision in the act of August 15, 1894 (28 Stat. L., 337), to which the commissioners and Major Randlett refer, is as follows:



"*And provided,* That said Indians shall pay $1.25 per acre for said lands from the fund now in the United States Treasury realized from the sale of their lands in Colorado, as provided by their contract with the Government."

It is considered necessary to go at length into the history of the agreement of 1880 and the action taken thereunder, as the facts are not only well known to the Department and the committees of Congress, but are fully set out in the communication of Major Randlett and the commissioners.

While under the strict letter of the law the Government is doubtless in a position to enforce payment for this land, yet I believe that equity and a sense of fair dealing with these Indians require that this provision should not be enacted. I am also of the opinion that a waiver of this requirement would produce such good feeling among the Indians as would remove many of the difficulties which now beset the commission and render its success in carrying out the provisions of the act of 1894 much more certain.

I therefore have the honor to recommend that the inclosed copies of the correspondence be transmitted to the Senate Committe on Indian Affairs with the recommendation that the following section be added to the Indian appropriation bill:

"SEC. —. That the requirement of the Act approved June fifteenth, eighteen hundred and eighty, entitled 'An Act to accept and ratify the agreement submitted by the Confederated Bands of Ute Indians in Colorado for the sale of their reservation in said State, and for other purposes,' and to make the necessary appropriations for carrying out the same, and that contained in section nineteen of the Act approved August fifteenth, eighteen hundred and ninety-four, entitled 'An Act making appropriations for the current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various

Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes,' which requires the Uncompahgre Ute Indians to pay the sum of one dollar and twenty-five cents per acre for the lands that may be allotted them in Utah, be and the same is hereby waived by the United States and the allotments provided for in said agreement and said Act of August fifteenth, eighteen hundred and ninety-four, shall be made without any price to be paid or charge to be made against any funds to the credit of the Indians."

Very respectfully, your obedient servant,

D. M. BROWNING,
*Commissioner.*

THE SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, June 3, 1895.*

SIR: Section 20 of the act of Congress approved August 15, 1894 (28 Stat. L., 286), which authorizes the appointment of a commission to allot in severalty to the Uncompahgre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands, contains the following clause:

"Said commissioners shall, as soon as practicable after their appointment, report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided."

I am now in receipt of a report from the Ute Indian commissioners, dated May 6, 1895, relative to the lands which may be opened under the above provision. Report inclosed herewith.



The commissioners do not hesitate to say, after a thorough exploration of the country east of Green River, which embraces about 1,800,000 acres of the 2,000,000 acres that make up the entire reservation, that there is no arable land upon it suitable for Indian allotments, except about 10,000 acres of bottom land extending 10 or 12 miles up the White on both sides from its mouth.

They also say: "That portion of the reservation explored, embracing, as before said, all the land east of Green River and both above and below the White, is, with the exception of the valley of the White (about 10,000 acres) and the valley of the Green (unsuited to agricultural purposes), a desert *above*, a desert of shifting sand scantily supplied with a stunted growth of sage and grease wood and destitute of water after leaving these rivers until Badland Creek is reached near the northern boundary of the reservation; and *below* a desert too, but instead of shifting sand one of hard ground and sheets of rock, seamed and fissured, along which in every direction are crags, precipices, and piles of bowlders terribly broken up and shattered and thrown together in every conceivable shape and size. This rocky waste, however, is relieved by several small streams running north, which, by the aid of the vegetation that increases in richness and variety as the country in successive rolls rises to mountainous ranges on and beyond the southern border of the reservation, form about the only good pasture lands to be found for these Uncompahgre Indians."

From this report it appears that the commission is satisfied that none of the reservation east of Green River, except the valley of the White, is suitable for agricultural allotments. The commissioners therefore suggest that that portion of the Uncompahgre Reservation east of Green River and north of White River, but not including the bottom lands of the two rivers, may be opened to settlement.

They do not make a similar recommendations as to the lands east of Green River and south of White River, for

the reason that, although unsuited to agricultural allotments, these lands, unlike the former, are well watered, furnish good pasturage, and being extensively used by the Indians for grazing purposes, should be saved to them until all allotments are completed.

The report being somewhat contradictory and not being able to positively determine whether the commissioners proposed to reserve the bottom lands of the White River for a distance of 10 or 12 miles, or to the Colorado line, I sent them the following telegram on May 31, 1895:

"Does your report of May 6th contemplate reserving for allotments to Indians any bottom or other lands on north side of White River east of range line between ranges 21 and 22 east Salt Lake meridian? Wire answer."

In reply Chairman Scott replied on the same day, as follows: "Our report was intended to reserve all the bottom lands on the White River between its mouth and the Colorado line."

In accordance with the suggestion of the commission, as above explained, I have the honor to recommend that the following-deserted portion of the Uncompahgre Indian Reservation in Utah be opened to settlement under the provisions of the act of August 15, 1894 (28 Stat. L. 286), viz:

Beginning at a point where the section line between sections 13 and 24, in township 9 south, range 25 east, Salt Lake meridian, if extended, intersects the eastern boundary of Utah Territory; thence west on the section line between sections 13 and 24, 14 and 23, 15 and 22, 16 and 21, 17 and 20, 18 and 19, in township 9 south of ranges 25, 24, and 23 east of said meridian; thence north on the range line between ranges 22 and 23 to the northeast corner of township 9 south, range 22 east; thence west on the north boundary of said township to the northeast corner of section 4 of said township; thence north on section line to the northeast corner of section 21, township 8 south; thence west on the section line to the northwest corner of section 19 in said township; thence north on the range line between ranges 21 and 22 east to the southeast corner of township 6 south of range 21 east; thence east on the south boundary of township 6 south, range 22 east, to the southeast corner of said township; thence north on the range line between ranges 22 and 23 east to the northeast corner of section 25, township 6 south, range 22 east; thence east on the south line of sections 19, 20, 21, 22, 23, and 24 of township 6 south, range 23 east, to the range line between ranges 23 and 24 east; thence south on said range line and following the present boundary of the reservation to the southwest corner of township 6 south, range 24 east; thence east on said reservation boundary to the southeast corner of fractional township 6 south, range 26 east; thence south on said reservation boundary, being the east boundary of Utah Territory, to the place of beginning.



It is altogether desirable that the lands to be opened to settlement should be described by legal subdivisions of the public survey. To describe them as being all the lands "between (not including) the bottom lands" of Green and White rivers would be too indefinite and not at all satisfactory. I have therefore followed lines of the public survey in describing the lands to be opened to settlement, and have taken care to reserve enough lands along both rivers to embrace, it is thought, all the bottom lands of both of said rivers. If more land is reserved than will be needed for allotments to the Indians the surplus not so needed can be opened at some future time.

I inclose for your convenience a map of Utah, showing the lines by which the tract it is proposed to open is bounded.

Very respectfully, your obedient servant,

THOS. P. SMITH,
*Acting Commissioner.*

THE SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, January 14, 1896.*

SIR: I have the honor to submit for your consideration the following statement of facts relative to the work of the Uncompahgre and Uintah Ute commission, showing what has thus far been accomplished and the seeming difficulties in the way of the successful accomplishment of the aims and purposes of the law under which said commission is now operating.

The law (28 Stats., pp. 337-338), briefly stated, provides for the appointment of a commission of three persons to allot in severalty to the Uncompahgre Utes, within their reservation, in Utah, agricultural and grazing lands according to the treaty (agreement) of 1880 (21 Stats., p. 199)—to heads of families, each, 160 acres of agricultural lands, and not to exceed 160 acres of grazing lands additional; to single persons over 18 years of age, each, 80 acres of agricultural, and not to exceed 80 acres of grazing lands additional; to orphan children, each, same as last mentioned; to each other person under 18 years of age, born prior to such allotment, same as last; provided that, with the consent of the commission, any adult Indian may select a less quantity of land, if more desirable on account of locality.

It is also provided that said Indians shall pay $1.25 per acre for the lands that may be alloted to them, from the money realized from the sale of the lands in Colorado from which they were removed when they were taken to Utah.

A further important provision is that said commission shall, as soon as practicable after appointment, report to the Secretary of the Interior what portions of said Uncompahgre Reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public



domain and made subject to entry as thereinafter set forth.

After indicating the manner in which the unallotted lands shall be disposed of, the law imposes a further duty upon the commission, as follows:

"That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by act of Congress."

The commission, Messrs. Scott, Byrnes, and Davis, entered upon their duties under instructions approved by you December 8, 1894.

On January 8, 1895, they submitted a report in which they referred to the provisions in the act of June 5, 1880 (supra), ratifying the agreement with the Utes, which require that the Uncompahgre Indians shall pay $1.25 per acre for the lands allotted them, and stated that these Indians were unable to see why they should be required to pay for the lands to be allotted to them while the Uintahs, living alongside, were not required to make such payment. The commission anticipated great difficulty in satisfactorily explaining this matter to the Indians and suggested whether it would not be best for the Government to relieve the Indians of this payment. January 26, 1895, I recommended that a section be added to the then pending Indian appropriation bill relieving the Uncompahgre Indians of the payment required by the act of June 5, 1880, but favorable action was not taken by Con-

gress. As we have already seen, the requirement as to this payment is repeated in the act of August 15, 1894 (supra).

In your Annual Report for 1895 (p. 10) I observe that you do not feel inclined to favor the suggestion for relieving these Indians of this payment. You remark: "If they are given agricultural lands, as the agreement specifies, I see no reason why the credits should not be made upon the trust fund, unless the delay in allotment is cause for complaint on the part of the Indians." It may be proper to state here that no complaint has been made by the Indians, so far as I know, on account of the delay in making allotments to them.

I am now in receipt of a further report from the commission, dated December 21, 1895, in which they report, in substance and effect, that it is impossible to induce the Uncompahgre Utes to take allotments in severalty as contemplated by the act of August 15, 1894, in view of the legal requirement that they must pay $1.25 per acre for any and all lands that may be allotted to them. I inclose the report, and invite the careful attention of the Department to all that is said in advocacy of relieving the Uncompahgres from this payment.

It is very evident from this report that it would be idle to continue the efforts to induce these Indians to take allotments in severalty so long as this, to them, objectionable requirement is insisted upon. A whole year has been spent principally in the endeavor to persuade these Indians to take allotments, and the task appears to be a hopeless one under existing conditions.

There is another matter which gives serious concern, and that is, there is in reality but very little, if any, land within the entire Uncompahgre Reservation proper suitable for allotment as agricultural land. The commissioners report with positiveness that while certain parts of the reservation are suitable for grazing allotments none of it



east of Green River and but little of it, comparatively speaking, west of that river is fitted for agricultural allotments to Indians.

As the Department is aware, when the Uncompahgres were removed to Utah lands were selected for them not only within what is now the Uncompahgre Reservation, but also the lands along the Duchesne River, from its junction with the Green up to a point 8 miles above the mouth of the Uintah River. The lands along the Duchesne are within the boundaries of the Uintah Reservation and the Uncompahgres are entitled to take their allotments there, but not farther than 8 miles above the mouth of the Uintah.

In the original instructions to the commission it was pointed out that there was believed to be a very considerable area of fertile land on the Duchesne as yet unoccupied, and they were instructed, if such was found to be the case, to see that every acre of it was taken in allotment. In their late report the commissioners state that there are several thousand acres subject to allotment to the Uncompahgre Indians on the Duchesne River—good agricultural land and perfectly adapted to their wants. They think that there is enough of this fine land there to furnish agricultural allotments to two or three hundred of the Uncompahgres. This, of course, is an entirely insufficient quantity. But the commissioners observe that above the 8-mile limit on the Duchesne there is ample land of fine quality to supply farms and homes for the entire Uncompahgre tribe, taking in, of course, the land already belonging to the Uncompahgres below the 8-mile limit. It is rightly stated, however, that this land (above the 8-mile limit) belongs to the Uintah Indians, and can only be secured by negotiations with them. They suggest, however, that there would be no difficulty in negotiating for its purchase on reasonable terms, inasmuch as the Uintahs and Uncompahgres are very friendly.

Probably this assumption is correct, and the authority to negotiate with the Uintahs cited in this report (p. 2)

would, it is believed, cover negotiations for the accomplishment of this object. But if the Uncompahgres, by reason of the requirement that they must pay $1.25 per acre for their lands, object to taking allotments on that part of the Duchesne which was selected for them and where they are now privileged to take them, it is not seen how it would better the matter to procure, by purchase or otherwise, more land in that neighborhood and offer it to them in allotment upon the same conditions.

A question arises here, however, which I think should be considered:

Did the agreement and act of 1880 (supra) which provides that the United States shall reimburse itself from the proceeds of the sale of the Colorado lands "in payment for the lands at $1.25 per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement," contemplate that such payment should be made for any lands that might be selected for them within *an existing Indian reservation*—lands that had long been reserved from the public domain and set apart for Indian purposes? The agreement with the Indians provided, and it was expected, that the Uncompahgres would settle on the Grand River, near the mouth of the Gunnison, in Colorado, within the territory ceded by the Ute Indians in said agreement, if a sufficient quantity of agricultural lands could be found there, and in anticipation of their settlement there some $21,000 was expended out of the Ute removal fund to make surveys for allotments for them there (subsequently reimbursed, 23 Stat. L., p. 95). But if a sufficient quantity of land could not be found on Grand River then they were to be settled upon such other unoccupied agricultural lands as could be found in that vicinity, and in the Territory of Utah, and for any land which might be ceded to them *outside of their reservation* for their allotments the United States was to be reimbursed in the sum of $1.25 per acre.

It appears that a sufficient quantity of land to meet the requirements could not be found in Colorado, and lands



were selected for them in Utah, *a portion of the selected lands being within the Uintah Reservation.* Whether the agreement and act of ratification really authorized or contemplated the selection of any lands for the Uncompahgres within the Uintah Reservation or not, the fact remains that lands were selected for them on said reservation, as hereinbefore stated, "along the Duchesne River, from its junction with the Green up to a point 8 miles above the mouth of the Uintah River," and the selection was approved by the Secretary of the Interior. (Annual Report Indian Office, 1881, p. 327.) Moreover, the lands that were selected for said Indians within the Uintah Reservation appear to be about the only lands of all that were selected for the Uncompahgres that are suitable for allotments for agricultural purposes, and the commissioners report that "already many farms have been opened (by the Uncompahgres) on the Duchesne, well fenced with wire and cedar posts, having necessary ditches for irrigation and good, comfortable homes, all occupied by Uncompahgre families, who are working to advantage and profit," and that "steps have also been taken to provide a canal for a body of land on the south side of the lower Duchesne, containing about 4,000 acres, which, when houses and fences for it are constructed, will accommodate many other families of this band that are ready and waiting to take possession, so that, as before indicated, when these Indians can be induced to accept allotments a large part of them will be able to receive the same from lands on which they have already been settled and engaged in cultivating.

Then, as it turned out, the United States got the benefit of all the lands purchased from the Ute Indians by the agreement of 1880. None of the Indians were given allotments upon the lands so purchased, and it would appear from the recent reports of the Ute Commission that but very few, if any of them, can be accommodated with agricultural lands within the territory selected for them on the Green River and White River, in Utah,

within the present Executive Order Reservation; this for the reason, as already stated, that there is but very little, if any, suitable land there for allotment to them. Now, if these Indians should, by proper arrangement, all be settled and given allotments on the Duchesne, within the Uintah Reservation, would it be proper for the Government to insist that they should pay $1.25 an acre for their lands? The commissioners have found it very difficult to explain to them in any satisfactory way why they should pay for lands taken in allotment within the Uintah Reservation while their neighbors, the White River Utes, who were removed at the same time with them, and located on the Uintah Reservation, are not required to pay for theirs.

Had the Uncompahgres settled on the Grand River within their old reservation in Colorado, no payment would have been required of them for the lands taken in allotment. It was only for lands "ceded to them by the United States *outside of their reservation*" (in Colorado) that the Government was to be reimbursed for. Now, if they take their allotments on the Duchesne, within the Uintah Reservation, will they be required to pay for them at the rate of $1.25 per acre? If so, why should not the White River Utes be required to pay for their allotments at the same price? It has never been suggested, so far as I am aware, that the White Rivers would be required to make such payment when they come to take their lands in severalty on the Uintah Reservation.

It is not known positively whether the Uncompahgres would all be willing to settle on the Uintah Reservation, but it is inferred that they would from the recent report of the Commission, provided, of course, that they are not required to pay for the lands. Again, if they should all agree to settle there, what would become of the Executive Order Reservation—the Uncompahgre Reservation proper? The law (act August 15, 1894) provides that the lands ascertained to be unsuitable or not required for allotment shall be restored to the public domain and made



subject to entry by the Whites. But would the Uncompahgres be willing to give up whatever rights they have in and to said lands in consideration of their being allowed to take lands—all of them—in allotments on the Uintah Reservation? This is a question that can only be determined by consulting them.

The questions arising in my mind after reviewing the work of the commission up to this time are:

(1) Shall the commission make any further effort to induce the Uncompahgres to take allotments in severalty under existing conditions?

(2) Is it your desire that they shall make further report of lands not suited or required for allotment, in order that such lands may be restored to the public domain?

In your annual report for 1895 (p. 10) you were pleased to recommend the passage of such legislation "as will provide for the disposal of the Gilsonite deposits by lease or sale to the highest bidder." In view of this, is it desirable that the commissioners shall be directed to make further report upon lands not suited or needed for allotments?

(3) Shall the commission suspend work among the Uncompahgres and proceed to negotiate with the Indians of the Unintah Indian Reservation "for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotments in severalty to said Indians, and if possible procure the consent of said Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty within such reservation," etc.?

In connection with the last question it has occurred to me that it might not be wise to undertake negotiations with the Uintahs until something definite is reached in regard to the final settlement of the very serious and preplexing difficulties met with in carrying out that part of the law relating to the Uncompahgres.

The Uintah Reservation is admirably adapted to Indian uses, and it seems to me that it should be kept intact for their use and occupation until it is ascertained beyond question that there is a surplus over and above the present and prospective wants of the Indians thereon and in that region of country, when such portions as are really not needed might be disposed of for white settlement. Leaving out the Uncompahgre Executive order reservation the Uintah Reservation is the only Indian reservation in the entire State of Utah, and I do not think we should be in a hurry to encroach upon it simply because it happens to be attractive to white home seekers.

I have already referred to the recommendation contained in your last annual report for further legislation in regard to the disposal of the Gilsonite deposits within the Uncompahgre Reservation. I believe that the best way out of the difficulties met with in carrying out the present law would be to obtain some such legislation as was provided in the case of the Chippewa Indians in Minnesota and other Indians in northern Montana and Fort Berthold (24 Stat. L., p. 44). For example, such authority as this:

To enable the Secretary of the Interior to negotiate with the Uncompahgre tribe of Indians and with the Indians residing upon the Uintah Indian Reservation in Utah for such modification of existing treaties and agreements with said Indians and such change in their reservations as may be deemed desirable by said Indians and the Secretary of the Interior, —— thousand dollars, or so much thereof as may be necessary; but no agreement made shall take effect until ratified by Congress.

With such general authority, I thing an agreement could be reached with the Indians which would be satisfactory both to them and the whites who were interested in procuring the legislation under which the Ute commission is now operating.



I desire to direct attention to one other point requiring your consideration.

Section 20 of the act of August 15, 1894, authorizes and directs the appointment of a commission of three persons to allot lands in severalty to the Uncompahgres, and section 22 provides that said commission shall also negotiate with the Uintah Indians. The commission was originally composed of three persons, but one of the number, Mr. Davis, died on the 19th of August last, and his place has not as yet been filled. The question arises whether the commission could, as at present constiuted, go on and negotiate with the Uintah Indians as provided in section 22 of the act in case it should be decided to undertake such negotiations without any further legislation. It should be stated in connection with this subject that the chairman of the commission reports that with the commission composed of but two members the funds of the appropriation will not be exhausted—allowing for the payment of the expenses of the commission in returning to their homes—until the 25th day of May next.

Very respectfully, your obedient servant,

D. M. BROWNING,
*Commissioner.*

THE SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,
COMMISSION FOR ALLOTMENT OF LANDS TO INDIANS IN UTAH.
*Fort Duchesne, Utah, May 6, 1895.*

SIR: In your letter of March 15, 1895, you expressed the hope that the Ute Indian commissioners would be able, for the information of the Secretary of the Interior, to report to you at an early day "what portions of the Uncompahgre Reservation are unsuited or will not be required for allotment to the Indians." In response to that

communication the undersigned immediately (March 22, 1895) informed you that as soon as the weather would admit of a personal inspection by them of the reservation the desired information would be promptly furnished you.

By reference to the map of Utah published by the General Land Office in 1893—a copy of which was furnished the undersigned by the Indian Office—it will be seen that the Uncompahgre Reservation proper is divided by the Green River, which enters near the middle of the northern border and passes out at southwestern corner, leaving on the western side of that stream two inconsiderable triangles, separated from each other by the southeastern slip or tongue of the Uintah Reservation, which, running down on both sides of the Duchesne River, touches the Green at or about the confluence of the two streams. From the same map it will be further perceived that the main body of the Uncompahgre Reservation, which lies east of the Green River, is divided into what may be termed northern and southern parts by the White River, which, entering from Colorado and flowing west, empties into the Green not far from the mouth of the Duchesne on the opposite side.

After a thorough exploration of this country east of the Green, which embraces about 1,800,000 acres of the 2,000,000 acres that make up the entire reservation, the undersigned do not hesitate to say that there is no arable land upon it suitable for Indian allotment except about 10,000 acres of bottom land extending 10 or 12 miles up the White on both sides from its mouth. This statement is somewhat in conflict with what is set forth in the report of the commissioners who settled the Uncompahgre Indians here in 1881, a clause of which is embodied in the instructions given to this commission. The whole paragraph from which the clause is taken reads as follows: "The valleys which we have selected vary from one-half to 6 miles in width. The altitude is about 48 feet. Along the Green River is an abundance of cotton-



wood timber for the wants of the Indians for fencing and firewood. The bottom lands are rich and can be easily irrigated and made available by inexperienced labor. Situated as they are between the agency of the White River and the agency of the Uintah, they have hitherto been practically unoccupied because of the supposed danger in living between these two bands of Indians and along the trail from one agency to the other. Mr. Saddler has now an improved ranch in the valley of the White River, 5 or 6 miles from the agency, upon which he has this year raised a splendid crop of wheat, corn, potatoes, and other vegetables. With these lands the Indians can, if they will make the effort, eventually support themselves. It will, however, require considerable time and encouragement before they will make the best use of the opportunities now open to them."

What is here said when applied to the valley of the Duchesne and that of the White is just, but will not do when applied to any of the valley lands, great or small, of the Green. The altitude of the Green River bottoms at certain seasons of the year may indeed be 48 feet, perhaps more, but when the undersigned a few days ago crossed that river the altitude was scarcely 3 feet, and before the lapse of many days the altitude will no doubt be nothing at all, for every foot of these Green River bottoms, according to the testimony of old inhabitants, whether whites or Indians, is flooded during the spring of each year.

The Green River bottoms, it is true, where the land has not been injured by water standing upon it during the season of vegetation, can be utilized for grazing purposes, and certain Indians are now making use of them or parts of them in that way; but that they could ever be made available "by inexperienced labor" is one of those grave mistakes into which agents of the Government have not unfrequently fallen when dealing with Indians.

That portion of the reservation explored, embracing, as before said, all the land east of Green River, and both above and below the White, is, with the exception of the valley of the White (about 10,000 acres) and the valley of the Green (unsuited for agricultural purposes), a desert of shifting sand, scantily supplied with a stunted growth of sage and grease wood and destitute of water after leaving these rivers until Badland Creek is reached near the northern boundary of the reservation; and below, a desert too, but instead of shifting sand one of hard gravel and sheets of rock, seamed and fissured, along which in every direction are crags, precipices, and piles of bowlders terribly broken and shattered, and thrown together in every conceivable shape and size. This rocky waste, however, is relieved by several small streams running north, which, by the aid of the vegetation that increases in richness and variety as the country in successive rolls rises to mountainous ranges on and beyond the southern border of the reservation, form about the only good pasture lands to be found for these Uncompahgre Indians.

It is evident from what has been said that the undersigned are satisfied that none of the reservation east of Green River, except the valley of the White, is suitable for agricultural allotment. They therefore suggest that all the northeastern portion, between (not including) the bottom lands of the two mentioned rivers, might be taken up by the Government and thrown open to settlement. They, however, do not make a similar suggestion with regard to the lands south of the White, for the reason that, although unsuited to agricultural allotment like the former, these lands unlike the former are well watered, furnish good pasturage, and being extensively used by the Indians for grazing purposes should be saved to them until all allotments are completed.

In the drawing hereto attached that part of the reservation which in the previous statement is suggested as



comprising all the land that it would be prudent in the judgment of the commission to segregate just at this time is inclosed in red lines.

The undersigned beg to say in conclusion that they were materially assisted in the work of exploring the reservation by Mr. John McAndrews, one of the clever employees at the Ouray Agency, who by long service with the Uncompahgre Indians has become well acquainted with every part of their present country.

Respectfully submitted.

S. S. SCOTT,
T. A. BYRNES,
WM. S. DAVIS,
*Ute Indian Commission.*

Hon. D. M. BROWNING,
*Commissioner of Indian Affairs, Washington, D.C.*

[Map Omitted in Printing]

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DEPARTMENT OF THE INTERIOR,
COMMISSION FOR ALLOTMENT OF LANDS TO INDIANS IN UTAH,
*Fort Duchesne, Utah, December 21, 1895.*

SIR: You will please pardon the statement, by way of introduction, of a few facts well known to the Indian Office, as it is simply made in order that all which follows in the main body of this report may be clearly understood.

By the treaty of 1880 with the confederated bands of Ute Indians in Colorado the whole of their reservation in that State, containing over 10,000,000 acres, was ceded to the United States for $1,250,000, or about 12½ cents per acre, which was about the price per acre received by them for the block of nearly 4,000,000 acres previously cut out of the reservation in the cession under what is

known as the Brunot treaty of 1873; and said bands, except the Southern Utes, who were otherwise provided for, agreed to take allotments of lands in severalty, paying for the same $1.25 per acre, on the Grand River near the mouth of the Gunnison, if a sufficiency of land for the purpose could be had there; if not, the residue were to be supplied with lands at the stipulated price over the line in Utah.

The commission, acting under this agreement, located none of these Indians near the mouth of the Gunnison, but carried all of them to Utah—the White Rivers into the Uintah Reservation and the Uncompahgres to land on the Green, White, and Duchesne rivers, near the mouths of the two last-named streams. No lands were allotted to any of these Indians by that commission. Subsequently, to wit, January 5, 1882, the lands upon which the Uncompahgres were placed, with certain parts of the adjacent country, embracing about 2,000,000 acres, were set apart as a reservation for them by Executive proclamation.

By the Indian appropriation act approved August 15, 1894, it was provided, among other things, that the requisite steps should be taken to allot lands in severalty to these Uncompahgre Indians according to the terms of the treaty of 1880. The present commission appointed under this law have met with grave difficulties in the attempt to carry out its provisions. Along with the effort to induce the Uncompahgre Indians to accept of lands in severalty it was of course necessary to find lands suitable for them to take among those especially set apart for the purpose. There were over 1,000 Uncompahgre Indians to be supplied.

Upon investigation it was discovered and so reported to the Indian Office that the lands of the White and Green rivers on the reservation (except a few thousand acres near the mouth of the former), which were supposed by the commission of 1880 to be susceptible of "easy irrigation" and adapted to "cultivation by inexperienced labor," were wholly unfitted for the purpose, as, with the exception given, there were no bottoms that amounted to much on the White, and the bottoms of the Green were subject to periodic overflows. It should be said now that subsequent investigation by an army officer and an accomplished civil engineer has shown that even the exception heretofore given of the few thousand acres at the mouth of the White was incorrect, as the difficulty of reaching the main channel of the river, especially on the south side, where most of the best arable land is found, with a canal high enough up the stream to bring irrigating water to the surface of the bottoms below, with the heavy expense that would attend the work, renders the acceptance of even these bottoms for agricultural allotments to Indians improper and unwise. So it may be affirmed that while certain parts of the Uncompahgre Reservation proper are suitable for grazing allotment none of it east of Green River, and but little of it, comparatively speaking, west of that stream, is fitted for agricultural allotment to Indians.



But there are several thousand acres subject to agricultural allotment to these Uncompahgre Indians, and perfectly adapted to the purpose in every respect, on both sides of the Duchesne River, extending from its mouth to a point 8 miles above its confluence with the Uintah. These lands are extremely rich, well wooded in places, are not subject to overflow, and can readily be irrigated—parts of them, indeed, have already been irrigated—as will appear hereafter. It is rather difficult to indicate with any certainty how many acres can be secured here for the purpose suggested, perhaps enough to furnish agricultural allotments to two or three hundred Indians. Above the 8-mile limit, however, on the Duchesne, say for 12 or 15 miles, on the south side to the place where the elevated mesa first strikes the river, extends an area of rich bottom, varying from a half mile

to 2 miles in width, that can be brought under cultivation with little trouble, and which, with certain lands in the immediate vicinity on the north side, and with the lands on the lower Duchesne referred to, would be sufficient to supply farms and homes in rather a compact body to the entire Uncompahgre band. But this land being above the 8-mile limit belongs to the Uintahs and can only be secured by negotiation with them. No difficulty as to its purchase on reasonable terms is anticipated, as the Uintahs are very friendly with the Uncompahgres and would be glad no doubt to have them on their reservation.

The lands referred to on the Duchesne, lying between its junction with the Green and the wight-mile limit above the mouth of the Uintah, are the ones to which the attention of the commission has been especially directed, as being the only lands available for agricultural allotment to the Uncompahgre Indians under the law of August 15, 1894. Before taking any steps for the allotment of these lands there were serious difficulties to be met and removed by the commission. About fifteen years have elapsed since the treaty of 1880. A new generation of Indians now largely make up and control the Uncompahgre band; and to them the treaty is merely a tradition. During the twelve or more years that they have been occupying the reservation they have been accustomed to use it as their property, and the idea thus formed of its being such has been still further strengthened by their knowledge of the ownership on the part of their brothers, the Uintah Utes, of the reservation close by. And besides, the older living Uncompahgre Indians who signed the treaty claim that they did not agree to pay for the lands which might be allotted to them in severalty, $1.25 per acre, but that the lands were to be given them in part payment for the better lands which they had so reluctantly relinquished in Colorado.

The contention of these Indians against this payment, so persistently and decidedly made in all talks had between them and the commission, seems really to spring from honest opinions and impressions. Arguing upon the hypothesis of good faith in Government agents when dealing with them, the commission has attempted to show in previous reports that the channel of communication was no doubt the cause of disagreement in the matter—that the agents either failed to make themselves understood by the interpreters or that the interpreters failed to make themselves understood by the Indians, and cases were cited in which one or the other of these things evidently occurred in previous negotiations with these very Indians. For these reasons, and others set forth in those reports, the commission urged a waiver on the part of the Government of the right to exact this sum of $1.25 per acre in the prosecution of the work of allotment.



Another point that should be mentioned in connection with this matter of waiver and the good policy of its being made is the difference between the price received by these Indians for their lands in Colorado and that which is claimed of them for the lands under the contemplated settlement, along with the difficulty of making any satisfactory explanation of the subject to such a people. As has been stated, they received for their lands in Colorado only about 12½ cents per acre. Now, they say, they are called upon to pay $1.25 per acre—just ten times as much—for lands to live on here in Utah, where they never wanted to come. If their wishes, they continue, had been consulted at all, they would have taken their allotments on the Grand River near the mouth of the Gunnison, as the treaty of 1880 provided. It is not pretended to intimate that the above is the proper way to regard the transaction in all of its parts, but simply to indicate that such is the way these Indians look at it, and it is by no means easy to satisfy them of the justice and rightfulness of the proposed action on the part of the Government.

These Uncompahgre Indians had to be dealt with very cautiously by the commission. They have been distrust-

ful of it from the beginning. The fires of this distrust have been kept burning, it is believed, by the talk of persons who have no love for the Indian, and perhaps no love for anything save mischief.

The commission has sought by all due methods to overcome this feeling—has striven to satisfy these Indians that the Government is their friend and is working in every way for their benefit and advancement. Any other course than one of conservatism and conciliation under the circumstances would have been likely to produce trouble, and the trouble might have become widespread.

The Uncompahgres are the leading and controlling band of the Ute Indians. Their influence with the other bands is great. While trouble with them would have certainly broken down their growing interest in schools and farming operations, and have set them many years back in the march of civilization, it might have so extended as to produce in the other bands the same evil effects; indeed, it might have gone even further and culminated in an outrage that could only have been put down after the sacrifice of many lives and the expenditure of more treasure than a half dozen such reservations are worth. But whether any undue pushing of the work of allotment might have been followed by such disastrous results or not, it would, as before said, undoubtedly have had a damaging effect upon the civilization of the Uncompahgres and, what is not likely to be regarded, would have rendered any attempt in the near future at negotiation with the Uintahs looking to their acceptance of lands in severalty and the release of any part of their reservation an impossibility.

The commission having therefore found it impracticable to induce the Uncompahgres to take the proposed allotments of lands upon the stipulated terms, decided for the grave reasons heretofore suggested to stand to the policy of getting the leading Indians of the band to accept lands for farming purposes, so situated and in such quan-



tities—regular subdivisions of sections—as would make subsequent allotment to them easy, should Congress in its wisdom determine to let them have the lands without the payment of the $1.25 per acre so strenuously objected to by them. The commission could only work in this way through the agent for these Indians. As agent he had the right to locate them upon lands for purposes of cultivation, etc. His cooperation in the matter has been cheerful, energetic, thorough, and has been followed by most beneficial results. Already, under the arrangement, many farms have been opened on the Duchesne River, well fenced with wire and cedar posts, having necessary ditches for irrigation, and good comfortable houses all occupied by Uncompahgre families who are working to advantage and profit.

Steps have also been taken to provide a canal for a body of land on the south side of the lower Duchesne, containing about 4,000 acres, which, when houses and fences for it are constructed, will accommodate many other families of this band that are ready and waiting to take possession. So that, as before intimated, when these Indians can be induced to accept allotments, a large part of them will be able to receive the same from lands on which they have already been settled and engaged in cultivating. It should also be stated here that the Uintahs are also being prepared for severalty allotment, when the time shall come for negotiating with them, by the settling of many of this band upon well-watered and well-improved farms with excellent dwelling houses in the large and fertile valley of the Uintah River.

Respectfully submitted.

S. S. SCOTT,
T. A. BYRNES,
*Ute Indian Commission.*

Hon. D. M. BROWNING,
*Commissioner of Indian Affairs, Washington, D. C.*

DEPARTMENT OF THE INTERIOR,
COMMISSION FOR ALLOTMENT OF LANDS TO
INDIANS IN UTAH,
*For Duchesne, Utah, December 23, 1895.*

SIR: When your letter of the 10th instant was received I had just prepared a report with regard to the whole Uncompahgre situation here that furnishes the information desired in the first clause. The report is herewith forwarded.

With regard to the second and last clause, permit me to state that from an examination of the books it appears that, with the commission as at present constituted, the funds of the appropriation will not be exhausted, allowing, as you suggest, for payment of expenses of the commission in returning home, until the 25th day of May next.

Very respectfully,

S. S. SCOTT,
*Chairman Ute Indian Commission.*

Hon. D. M. BROWNING,
*Commissioner of Indian Affairs, Washington, D. C.*

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UINTAH AND OURAY AGENCY,
*White Rocks, Utah, January 14, 1896.*

SIR: Referring to instructions directing me to cooperate with the board of commissioners appointed under the provisions of section 20, act of Congress, approved August 15, 1894, for service connected with the Indians, and the reservations of this agency, I have the honor to report that I have rendered to said commissioners all the assistance in my power, and that I believe they have accomplished as much of the purpose required of them as a proper regard for the best interest of the Government, and a just and humane respect for the rights of the Indians concerned, has permitted. It is a truth known to all that have cared to inform themselves in the premises, that the Uncompahgre Reservation contains insuffi-



cient land capable of being made agricultural for supplying the individual allotment-allowance provided for by law for the Uncompahgre Utes now residing upon it, and that the cry that white home seekers are waiting in disappointment and distress the opening of the surplus lands of this reservation for them to settle upon, is simply clatter that has originated with the impatient, greedy capitalists, and their unprincipled employees, who have been for years waiting and watching for expected events that would give them opportunities to grab and gobble up the asphalt mineral deposits that are located on the lands that will not be required in locating homesteads for the Indians.

During the service of the commissioners herein referred to the lands of the Uncompahgre Reservation that are so located as to be made available for agricultural purposes have been carefully observed, and in the plans working for the allotment of these lands to Indians full consideration has been given to the importance of providing canals and ditches for the conveyance of water thereto for irrigating purposes. Such canals and ditches have been commenced, and their construction so far advanced that they will practically be completed by the end of the present fiscal year, and embrace a system capable of irrigating all the lands of this reservation worth considering as agricultural and suitable for allotment. Besides this, a large number of homesteads with legal allotment of acreage have been laid out on section lines and inclosed with fence constructed of barbed wire on cedar posts that may be expected to last forty years. Upon 20 of these farms substantial log houses for dwellings have been constructed. These houses have paneled doors, double-sashed glass windows, single roof, and brick chimneys; they are respectable looking cottages. In my judgment the allotment of lands to the Uncompahgre Utes in the manner described has been commenced in a practical, humane, and common-sense way, and considering the peculiar provisions of the law under which the commissioners for such allotment are serving, no more

could have been accomplished, and to have attempted more would have jeopardized the best interest of the public service.

Referring to the instructions for me to try and convince the Indians properly residing on the Uintah reservation of the advantage that would accrue to them by relinquishing a portion of their lands, I have to state that from time to time during the past year I have presented this matter to representative men of these tribes, and feel authorized to state that the way is clear for the Commissioners to commence their work of negotiating with these Indians, as prescribed for them in section 22 of the act of August, 1894, herein before referred to, and I have no doubt that for a just and fair compensation these Indians can be induced to relinquish to the United States from the west side of their reservation 1,000,000 acres of their lands.

About the same number of farms have been paid out on the Uintah Reservation with same improvements as has been done on the Uncompahgre Reservation, and the preliminary work of allotting lands advanced fully as much, perhaps more, than has been accomplished with the Uncompahgres. I feel confident that if Congress removes the provisions for the Uncompahgres to pay for lands allotted to them, that when the spring opens the largest portion of that band can be located; that the Uintahs will cheerfully consent to give up sufficient of their lands to supply whatever deficiency may exist in suitable lands to locate the Uncompahgres upon, and that the commissioners now serving with these Indians will be able to make a great showing in their report of next season's work.

Very respectfully,

JAMES F. RANDLETT,
*Major, U. S. A., Acting United States Agent.*

The COMMISSIONER OF INDIAN AFFAIRS,
*Washington, D. C.*



**H.R. Doc. No. 248, 54th Cong., 1st Sess. (1896) (LD 40)**

HOUSE OF REPRESENTATIVES

54th Congress, *1st Session* Document No. 248

# APPROPRIATIONS FOR CONDUCTING NEGOTIATIONS WITH CERTAIN INDIANS

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LETTER

From

THE ACTING SECRETARY OF THE TREASURY,

Transmitting

*A copy of a communication from the Secretary of the Interior, submitting an estimate of appropriation for the purpose of conducting negotiations with certain Indians.*

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FEBRUARY 18, 1896.—Referred to the Committee on Indian Affairs and ordered to be printed.

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TREASURY DEPARTMENT,
*February 17, 1896.*

SIR: I have the honor to transmit herewith, for the consideration of Congress, copy of a communication from the Secretary of the Interior of the 15th instant, submitting an estimate of appropriation ($5,000) to enable the Secretary of the Interior to negotiate with the Un-

compahgre tribe of Indians and with the Indians residing upon the Uintah Reservation, in the State of Utah, for modification of treaties.

Respectfully yours,

S. WIKE,
*Acting Secretary.*

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, February 3, 1896.*

SIR: In compliance with your informal direction, I have the honor to submit herewith draft of an item, in duplicate, to be inserted in the Indian appropriation bill for the next fiscal year, authorizing negotiations with the Uncompahgre Indians and Indians residing on the Uintah Reservation, Utah, for such modifications of existing treaties and agreements with said Indians, and such changes in their reservations as may be deemed desirable, no agreement to be valid until ratified by Congress, and appropriating the sum of $5,000 for that purpose.

The history of the efforts made to carry into effect the legislation as to these Indians contained in the act of August 15, 1894 (28 Stat. L., pp. 337, 338), and the causes which in my opinion render this proposed legislation desirable, are so fully set out in office report of January 14, 1896, that I do not deem it necessary to repeat them herein, but transmit two copies of said report and two copies of the proposed item, and have the honor to recommend that one copy of each be transmitted to the Senate Committee on Appropriations and the other



to the Committee on Indian Affairs, House of Representatives, with recommendation of favorable action thereon.

Very respectfully, your obedient servant,

D. M. BROWNING,
*Commissioner.*

The SECRETARY OF THE INTERIOR.

[Indorsed.]

DEPARTMENT OF THE INTERIOR,
*February 15, 1896.*

Respectfully forwarded with my approval, through the Honorable Secretary of the Treasury, with the recommendation that the within item of appropriation be inserted in the Indian appropriation bill and be immediately available.

HOKE SMITH,
*Secretary.*

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*Draft of item proposed to be inserted in the Indian appropriation bill.*

To enable the Secretary of the Interior to negotiate with the Uncompahgre tribe of Indians and with the Indians residing upon the Uintah Reservation, in the State of Utah, for such modification of existing treaties and agreements with said Indians, and such change in their reservations as may be deemed desirable by said Indians and the Secretary of the Interior, five thousand dollars, or so much thereof as may be necessary, the same to be immediately available; but no agreement made shall take effect until ratified by Congress.

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, January 14, 1896.*

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**S. Doc. No. 161, 54th Cong., 1st Sess. (1896) (LD 41)**

SENATE

54th Congress, *1st Session* Document No. 161

IN THE SENATE OF THE UNITED STATES

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MARCH 11, 1896.—Laid on the table and ordered to be printed

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The VICE-PRESIDENT presented the following:

LETTER FROM THE SECRETARY OF THE INTERIOR, IN RESPONSE TO THE SENATE RESOLUTION OF THE 4TH OF MARCH, AS TO THE REASON THE NONAGRICULTURAL AND UNALLOTTED LANDS OF THE UNCOMPAHGRE INDIAN RESERVATION HAVE NOT BEEN RESTORED TO THE PUBLIC DOMAIN AND PROCLAIMED OPEN TO ENTRY AND LOCATION.

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DEPARTMENT OF THE INTERIOR,
*Washington, March 10, 1896.*

SIR: I am in receipt of Senate resolution of the 4th instant directing me to inform the Senate for what reason the nonagricultural and unallotted lands of the Uncompahgre Indian Reservation have not been restored to the public domain and proclaimed open to entry and location as prescribed by sections 20 and 21 of the act of Congress approved August 15, 1894, entitled "An act making appropriations for the current and contingent ex-



penses of the Indian Department." etc.; and, further, to inform the Senate when, in my judgment, said lands will be opened to entry and location.

In response to said resolution I have the honor to call your attention to pages 10 and 37 of my annual report for the fiscal year ending June 30, 1895, a copy of which I herewith transmit. That report sets forth the fact that valuable discoveries of "gilsonite" have been explored by officers of the Geological Survey on this reservation since the date of the passage of the act of August 15, 1894, supra, and shows that if these lands are opened to entry in the ordinary way the Government would be deprived of extensive profits which should go into its Treasury.

The information set forth in my report with reference to the valuable mineral on said land had not been so fully brought to the attention of Congress at the date of the passage of the act providing for the restoration to the public domain of the unallotted nonagricultural lands, and in that report I recommended such legislation as would provide for the disposal of the gilsonite deposits by lease or sale to the highest bidder.

As to the time when said lands will be opened to entry and location under the provisions of the act of August, 1894, I have to state that the matter of said opening is wholly under the control of the President, and I am not at present advised as to what his intentions are in that respect.

Very respectfully,

HOKE SMITH,
*Secretary.*

The PRESIDENT OF THE SENATE.

[Extract from Annual Report of the Secretary of the Interior, 1895, p. 10.]

*Uncompahgre Reservation.*—The Commission provided for by the act of Congress was appointed to visit the Uncompahgre Reservation and to allot agricultural lands to the Indians there located. I am not prepared to concur with that portion of the report of the Commissioner in which he objects to crediting the trust fund of these Indians with the lands assigned to them. If they are given agricultural lands, as the agreement specifies, I see no reason why the credits should not be made upon the trust fund, unless the delay in the allotment is cause for complaint on the part of the Indians.

In that portion of this report which discusses the work of the Geological Survey will be found an informal report from the geologist who has examined the gilsonite upon the lands of this reservation which will not be needed for Indian allotment and which belongs to the Government. It will be seen that these deposits while they cover only a small area of land, are of immense value.

If they are open to entry in the ordinary way a few persons will obtain them at practically no cost, and shortly thereafter they will become the property of large companies engaged in using this mineral. I believe the true policy should be for the Government to sell these deposits to the highest bidders, or else to lease them. If they are disposed of under existing law a few thousand dollars will be picked up by the enterprising men who first go upon them, and then enormous profits, which at least in part should go into the Treasury of the Government, will be made by the companies organized to operate them.

I recommend the passage of such legislation as will provide for the disposal of the gilsonite deposits by lease or sale to the highest bidder.

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[Extract from Annual Report of the Secretary of the Interior, 1895, p. 37.]

*Mineral deposits on Uncompahgre Indian Reservation.*—Mr. Eldridge, of the Survey, was detailed informally to examine the mineral resources of the Uncompahgre Indian Reservation. He reports that gilsonite is the only mineral of known commercial value occurring on the reservation. He finds a number of large veins varying from 4 to 12 feet in width and of unknown but evidently considerable depth, from their geological relations. This indicates a vast deposit of gilsonite.

The bituminous shale, sandstone, and limestone might be of commercial value under favorable conditions for transportation. Practically the same materials elsewhere are employed either for paving purposes or made to yield up their hydrocarbons as commercial oils.

The gilsonite occurs as the filling of extensive cracks in the earth's crust. The deposits are therefore fissure veins. They are all nearly or quite vertical, and their general trend is north 45 degrees to 55 degrees west, a direction common to many of the folds in the mountain and plateau regions adjoining.

The number of important veins of gilsonite at present known is six—four in the eastern half of the reservation, one probably crossing the western edge of the reserve near the fortieth parallel, and one in the opened strip between the Uncompahgre and Uintah reservations, near Fort Duchesne, the southeastern end of which perhaps lies within the Uncompahgre Reserve.

Of the four veins in the eastern half of the reservation, one—the Black Dragon—is exposed on a tributary of the West Fork of Evacuation Creek, 20 miles south of White River, near the parallel of 39° 45′. This vein may be traced to the head of Asphalt Creek, and has a known length of between 3 and 4 miles. Its width at an opening

near the southeastern end of the fissure as exposed is 8 feet 6 inches; from this point southeastward the diminution in size is very rapid.

The second and third veins in the eastern portion of the reservation are known as the "little Bonanza" and "Big Bonanza," the former to the west of the latter. They are approximately parallel, and from 200 to 500 feet apart. They were traced to the north of White River for nearly 3 miles, and Mr. McAndrews, of the Indian police, states that he has followed them southeastward across the river quite to the Colorado line, in all, a distance of 10 or 12 miles. The maximum width of the Little Bonanza observed was 9 feet, of the Big Bonanza 13 feet 6 inches, but locally the Little Bonanza exceeds the Big Bonanza in width.

The "Cowboy," the fourth and largest of the important group of gilsonite veins in the eastern portion of the reservation, lies about 2½ miles northeast of the Bonanza veins, with which it is parallel. This vein has thus far been found only north of the river, but it here has a probable length of at least 5 miles, being clearly defined in outcrop for over half this distance, while for the remainder evidences of its presence exist in the float particles found in the soil and wash covering it. The maximum thickness of this vein was found to be 18 feet.

The thickness of the veins varies from the figures given above to 0 at the ends, and they are observed to widen and contract from point to point; but for much of the lengths given they appear to maintain an excellent workable width, from 4 to 12 feet.

The vein on which the St. Louis Gilsonite Company have opened a mine, lying 3 miles east of Fort Duchesne, is the original discovery. It is of the same nature as those already described, but is only about 4 feet wide, a width, however, held with little variation for between 1 and 2



miles, possibly even farther. The vein near the western edge of the reservation has not yet been visited.

The discovery of such veins is a matter for the prospector rather than for the geologist, as the position of a crack in broad and gently folded strata is undeterminable by any structural laws.

The amount of gilsonite in the region examined is enormous, for the depth of the fissures, though unknown, can not but be considerable—from 1,000 to several thousand feet—and, with their length and width, is indicative of phenomenal yield.

The presence on the Uncompahgre Reservation of minerals other than that already referred to is extremely questionable, particularly so in the case of the metallic ores—zinc, lead, copper, silver, gold. The entire area of the reservation, so far as a general survey and the evidence of earlier explorers (Hayden and others) show, is one of unaltered sedimentary rocks of Eocene age, devoid of all traces of eruptive action past or present.

The Survey has also contributed valuable assistance to other bureaus of the Department in reporting as to the feasibility of irrigation at designated points and in the examination of alleged mineral deposits.

**Excerpts from 30 Cong. Rec. (1897) (LD 45)**

CONGRESSIONAL RECORD—HOUSE

MARCH 20

* * * *

[102] Mr. SAYERS: I would like to ask the gentleman if the item in the bill with reference to the Uncompahgre Reservation meets his approbation?

Mr. SHERMAN. It is in the bill.

Mr. SAYERS. I ask if it meets the approbation of the gentleman from New York?

Mr. SHERMAN. It does not, and did not in conference committee. It was one of the items that the House conferees did not like, but we were obliged to accept it.

Mr. SAYERS. Then the gentleman thinks it a vicious item?

Mr. SHERMAN. I wish it were not in the bill. I opposed it as strongly as I could. It did not meet my approval, but I have stated the reasons why it was incorporated in the bill.

Mr. COOPER of Wisconsin. I would like to ask the gentleman [103] from New York a question for my own information. I wish to ask him with reference to the insertion of the item regarding the Uncompahgre Indian Reservation in Utah, about which the gentleman from Texas has just made inquiry. As I understand it, the United States Government has made a survey, has it not, of this Uncompahgre Reservation?

Mr. SHERMAN: A geological survey.

Mr. COOPER of Wisconsin. It has made a geological survey?

Mr. SHERMAN. Yes.

Mr. COOPER of Wisconsin. And has published the result of the survey in an official document?

Mr. SHERMAN. It has.



Mr. COOPER of Wisconsin. Setting forth definitely that that reservation contains asphaltum mines of very great richness?

Mr. SHERMAN. Or gilsonite; yes.

Mr. COOPER of Wisconsin. Gilsonite; the same thing.

Mr. SHERMAN. Yes; there is such a publication as that. The gentleman is correct.

Mr. COOPER of Wisconsin. Said to be among the richest asphaltum mines or gilsonite mines in the world. This bill proposes, does it not, to turn over to anyone who can hurry up and get onto these immensely rich properties the right to own them in fee simple for nothing?

Mr. SHERMAN. Oh, no; not for nothing.

Mr. COOPER of Wisconsin. For how much an acre?

Mr. SHERMAN. It proposes to open them up under the mineral-land laws. I believe the price is $5 an acre.

Mr. COOPER of Wisconsin. Five dollars an acre! Is that all the compensation the Government is to receive after having discovered and definitely located these immensely rich mines?

Mr. LACEY. The law contains further provisions with reference to working them.

Mr. SHERMAN. It is proposed to open up these lands under the mineral-land laws of the United States precisely as other mineral lands have been opened up for a great many years, precisely as lands which have contained gold and silver have been opened up. And my friend would hardly contend, I imagine, that gilsonite is more valuable than those metals. This land is to be opened up under precisely the same laws.

Mr. COOPER of Wisconsin. In no previous survey has the Government of the United States definitely located and then published to the world the location of rich gold mines and then turned them over to any person who could get onto them for $5 an acre.

Mr. SHERMAN. I can not say where it has done so.

Mr. COOPER of Wisconsin. Then the analogy which you have alluded to is not a good one. Now, do you think it wise and proper for the United States, knowing itself to be the owner of exceedingly rich asphaltum mines, knowing the exact location of those mines, they being the property of all the people, to turn them over to anyone who can get upon them, the first one to reach them, for $5 an acre, and no other compensation?

Mr. SHERMAN. Why, I think it is wise for the Government to pursue a consistent policy. If it is going to open up any mineral lands, they should be opened up in the same way as such lands have been opened up for fifty years. I do not know that there is any special reason why a new policy should be pursued in reference to this particular field or this particular mineral. I do not know why this should not be opened up in the same way that all other mineral lands, for all time, have been opened up in the United States.

* * * *

Mr. SHERMAN. This bill opens up the gilsonite property on the Uncompahgre Reservation, which is only an Executive order reservation, these Indians having no fee title to the reservation. It opens up these lands for entry under the mineral-land laws of the United States. There is no question but what that is precisely what it does.

Mr. SAYERS. Will the gentleman allow me to ask him this question, in the utmost good faith, because I have heard a great deal about this particular reservation?

Mr. SHERMAN. Certainly.

Mr. SAYERS. This matter has been pending in Congress for the last three or four Congresses.

Mr. SHERMAN. In one form or another.

Mr. SAYERS. What I want to ask the gentleman is this: Was there any information before the conferees of the House on this bill that there was an association, a syndicate of persons, who are interested in the passage



of this measure; and were not the conferees of the House told that if they did not accept that amendment that the bill should fail? Now, if the gentleman can answer that question I will be obliged to him.

Mr. SHERMAN. The conferees were not told that there was any combination to seize this land. I believe that statement was made, in effect, in the discussion in the Senate. The conferees were told, of course, by the Senate conferees that this provision in its present form, somewhat modified from the form in which the Senate passed it, must be accepted; that the Senate would agree to nothing less.

Mr. SAYERS. Did not they say that if it was not accepted that the bill should fail?

Mr. SHERMAN. The Senate conferees gave it as an ultimatum, substantially, that this provision must be in the bill.

Mr. SAYERS. I think this House ought to reject this bill on that account.

* * * *

[104] * * * The provision (which is purely legislative and subject to a point of order under the rules of both Senate and House) in regard to the Uncompahgre Indian Reservation, or, more properly, the Ute Reservation, for I think that region of country is owned by the Utes formerly of southern Colorado—this provision is one to which I specially invite the attention of gentlemen on both sides of the House, because if it is not considered now, it will have to be considered hereafter, and unless I am greatly deceived, will come back to plague us. The provision is as follows:

> That the mineral lands of the Uncompahgre Indian Reservation in the State of Utah are hereby declared open to public entry under the mineral-land laws of the United States, and no person shall be allowed to make more than four claims on lands containing gilsonite. And on and after January 1, 1898, all of said reservation unallotted to Indians

shall be open to public entry under the land laws of the United States.

I do not know anything about what transpired upon this subject in the committees of the last Congress—I presume nothing except what appears on the face of this bill; but what took place in the preceding Congress satisfies me that this provision ought not to pass. It puts these asphalt deposits, which are said to be exceedingly valuable, far more valuable than any of our mineral lands—it puts them under the mineral-land laws, so that they may be disposed of at, I believe, $5 per acre. It was shown to the satisfaction of the Committee on Indian Affairs in the Congress preceding the last that this deposit of asphalt was very extensive, and that combinations, syndicates, were even then forming for the purpose of getting control of those asphalt lands. This is the only important deposit of asphalt as yet discovered in our country or in North America. We are dependent now upon the Island of Trinidad, and perhaps islands in the Caribbean Sea, and some portions of Cuba, for this material. Those are all the deposits of asphaltum that have been discovered in America, although it is said to be found in large quantities in Asia Minor.

The opening up of this great deposit of asphaltum under proper safeguards against monopoly will be of enormous value to the United States. This provision involves vast interests. No one can overestimate the value of the property which is authorized to be given up to syndicates and monopoly by the apparently innocent provision I have quoted from this bill.

Let us save something from monopoly. In all likelihood this deposit of asphaltum (gilsonite), unless sheltered by provident legislation, will give rise to a most disreputable and dishonorable event in the history of Congress. We seem of all nations the most afflicted by combinations and syndicates of great influence in legislation. The case is a clear one. The only deposit of this valuable material which has so far been discovered in



the United States is the one on this Ute Indian Reservation. It is now under the absolute control of Congress, and it is now proposed to turn it over absolutely to a syndicate formed to control it several years ago without any safeguards against the monopoly certain to follow unless guarded against by proper legislation.

* * * *

* * * The question will come up again—it will force itself upon us within a few years if we make a mistake—whether or not whatever is realized from this deposit ought not to be held for the benefit of the Indians—the Utes—who have a possessory title to these asphalt lands. Every Indian reservation that was occupied by Indian tribes north of the upper Missouri was held by the same title by which the Utes hold this land, yet we have recognized their titles as valid and have paid them for their lands. We paid the Blackfeet and the other tribes upon exactly the same basis as if they had held those lands by final title, and ultimately we shall do the same with the Ute Indians. I hope, therefore, gentlemen will take time to consider this question. Let this bill go over, and let us have a little time for investigation.

* * * *

[105] Now, it occurs to me that, if the House agrees with myself and others on this subject, unanimous consent might be asked (if it be in order) to drop from the bill this provision with reference to the Uncompahgre Indian Reservation. Let that be left out, if it can be done by unanimous consent.

Mr. SAYERS. I understand the gentleman from Georgia says that he does not approve of this amendment?

Mr. MADDOX. I do not; and I do not think that any member of the committee does.

Mr. HOLMAN. Then suppose you strike out both provisions.

Mr. MADDOX. I should not object, so far as I am individually concerned. But I think this provision with

reference to the Uncompahgre Reservation should be stricken out at all events.

Mr. HOLMAN. Suppose you ask unanimous consent to strike both out.

Mr. MADDOX. I think the chairman of the committee will probably make that request.

Mr. Speaker, it is suggested that I ask unanimous consent to strike out this provision with relation to the Uncompahgre Reservation.

Mr. HOLMAN. And also the forty-four-thousand-dollar provision.

Mr. MADDOX. Let us take one at a time.

So far as the other provisions of the bill are concerned, while I do not ask gentlemen who have not been members of a former Congress to take my word, yet, if it be worth anything, I would state that this bill has been carefully considered. It will not be bettered by a further delay, and I am willing to take the responsibility for my part in framing the bill as it stands. Otherwise I should have offered a minority report.

Mr. HOLMAN. Both of these provisions were inserted by the Senate, I believe?

Mr. MADDOX. They were.

Mr. DOCKERY. I suggest to the gentleman that he ask unanimous consent to strike them out.

Mr. MADDOX. Certainly.

Mr. COOPER of Wisconsin. The gentleman understands, does he not, that these lands are worth millions of dollars?

Mr. MADDOX. Yes, sir; I do.

Mr. COOPER of Wisconsin. Do you think that you have, or we have, as legislators, any right to sell these lands for $5 an acre?

Mr. MADDOX. I do not; and I do not think that any man ought to be allowed to make four settlements, as an individual, on them, either.

Mr. COOPER of Wisconsin. Do you not think that we ought to sell that property, that we know to be worth



millions of dollars, as we would sell our own private property—that is, to the highest bidder, or else retain the lands and get royalty from them on the minerals which we know to exist there?

Mr. MADDOX. I do; and my suggestion is that we now, by unanimous consent, strike this provision entirely from the bill, and then I think that the bill should pass without objection.

Mr. DOCKERY. That is right.

Mr. MADDOX. Now, Mr. Speaker, if I am in order, I will ask unanimous consent that we strike from the bill this provision on page 67.

The SPEAKER. What is the clause the gentleman proposes to strike out?

Mr. SAYERS. The clause on page 67, from lines 1 to 8, inclusive.

Mr. MADDOX. That is correct, Mr. Speaker, lines 1 to 8, inclusive, on page 67.

The SPEAKER. The Clerk will read the provision proposed to be stricken out.

The Clerk read as follows:

> Strike from the bill the following words:
>
> "That the mineral lands of the Uncompahgre Indian Reservation, in the State of Utah, are hereby declared open to public entry under the mineral land laws of the United States, and no one person shall be allowed to make more than four claims on lands containing gilsonite. And on and after January 1, 1898, all of said reservation unallotted to Indians, shall be open to public entry under the land laws of the United States."

The SPEAKER. The gentleman from Georgia asks unanimous consent to strike this provision from the bill. Is there objection?

Mr. BARTHOLDT. I object.

Many MEMBERS. Oh, no.

Mr. JOHNSON of Indiana. I hope the gentleman will not insist on his objection.

[106] Mr. BARTHOLDT. I must insist.

Mr. JOHNSON of Indiana. It will simply compel a number of members to vote against the bill. I regard it in its present form as a profligate waste on the part of the Representatives, and I for one can not pretend to support the bill with this provision in.

* * * *

Mr. SHERMAN. Mr. Speaker, I now desire to renew the request, which was originally made by my colleague from Georgia [Mr. MADDOX], that lines 1 to 8, inclusive, on page 67, be stricken from the bill. I ask that my colleague from Missouri [Mr. BARTHOLDT] be allowed three or five minutes to make a statement, he having objected heretofore and desiring to make a statement before withdrawing his objection.

The SPEAKER pro tempore (Mr. HENDERSON). The gentleman from New York asks unanimous consent that the gentleman from Missouri be allowed three minutes to express his views. Is there objection? [After a pause.] The Chair hears none.

Mr. BARTHOLDT. Mr. Speaker, I have objected to the striking out of this provision in the bill because I am thoroughly impressed with the justice of this paragraph, the assertion of my distinguished friend from Texas [Mr. SAYERS], that it is robbery, to the contrary notwithstanding. I am somewhat conversant with the facts in this case, and for that reason, perhaps, I may be pardoned for occupying the attention of the House for a few minutes. At the present time the American people are compelled to pay from $30 to $60 a ton for asphaltum, imported, as nearly all of it is, from foreign lands. If you open this reservation, [107] within a few months the price of asphaltum will go down from $60 to $15 or $10 a ton, and that article could then enter into manufacturing processes where it can not now be used because of its expensiveness. I regard it a criminal neglect, if not a



crime, that these lands, upon which neither bird, nor fish, nor beast can live, have not been opened to civilization heretofore. There is no wrong to the Indians involved in this matter, because not a single Indian is living upon this territory to-day. The last Congress passed this provision in both Houses, and the President signed the bill containing it. Yes; your Democratic President signed a bill containing this very provision, or one very similar to it; and it is my honest judgment that your Secretary of the Interior should have been impeached for not enforcing and carrying out the law of Congress in this regard.

It is said that private interests are involved in this matter. Well, where would we be, Mr. Speaker, what would be the aspect and condition of our country, if it were not for individual enterprise and private interests? It is true that there are a number of gentlemen in the city of St. Louis, which I have the honor in part to represent upon this floor, who are operating a gilsonite or asphaltum mine in the neighborhood of this territory. That is true; but all these gentlemen desire Congress to do is to open these lands, so that the St. Louis Company can build a railroad for the purpose of enabling it and other companies that may be organized to compete with the importers who bring that article from Trinidad and other foreign countries.

* * * *

Mr. McRAE. Why is it that these lands can not be opened under the act of August, 1894? Why is it necessary to pass this provision?

Mr. BARTHOLDT. I will answer the gentleman. These lands are an Indian reservation, and are occupied at the present time by a tribe of Indians who were temporarily located there by an executive order of the President of the United States. They were told to stay there until better quarters could be found for them, and they occupy the lands at the present time—not the mineral lands, but the agricultural portion of the Uncompahgre Reservation. The commission that went out under the

authority of a law passed by the last Congress found that the lands which are proposed to be opened by this bill are of such a character that neither beast nor bird can live upon them; and there are no Indians nor any other people occupying any part or parcel of them now——

* * * *

The bill was ordered to be engrossed and read a third time; and it was accordingly read the third time.

The SPEAKER. The question is on the passage of the bill. The Chair supposes the House understands that the bill the passage of which is proposed has the provision relating to the Uncompahgre Reservation stricken out.

The question being taken on the passage of the bill, the Speaker declared that the ayes seemed to have it.

Mr. EVANS. I ask for the yeas and nays.

The yeas and nays were refused, only 15 members voting therefor.

The bill was passed.

* * * *

CONGRESSIONAL RECORD—SENATE
APRIL 14

* * * *

[712] The PRESIDING OFFICER. Unless otherwise ordered, the Senate will first consider the amendments proposed by the committee.

The reading of the bill was resumed. The next amendment of the Committee on Appropriations was, at the top of page 67, to insert:

> That the mineral lands of the Uncompahgre Indian in the State of Utah are hereby declared open to public entry under the mineral-land laws of the United States, and no one person shall be allowed to make more than one claim on lands containing gilsonite. And on and after January 1, 1898, all of said reservation unallotted to Indians shall be open to public entry under the land laws of the United States.



Mr. JONES of Arkansas. Mr. President, I am not satisfied that this amendment ought to be adopted. As is known to every member of the Senate, this has been a bone of contention for many years, and the provisions of this proposition, as contained in the bill that passed the Senate at the last session, were perhaps more radical than those in the pending amendment. But I wish to call the attention of the Senate to the latter part of this provision. However, I will read it all:

> That the mineral lands of the Uncompahgre Indian Reservation in the State of Utah are hereby declared open to public entry under the mineral-land laws of the United States, and no one person shall be allowed to make more than one claim on lands containing gilsonite. And on and after January 1, 1898, all of said reservation unalloted to Indians shall be open to public entry under the land laws of the United States.

I inquired at the Indian Office to what extent these lands have been allotted; how many persons there are in this reservation who have had lands allotted to them. Not one single allotment has been made, I understand. The Indians who are on the reservation were carried there against their wishes. They were put there years ago, and have remained there under circumstances not as favorable, perhaps, as might have been, and when the gilsonite was discovered the proposition was immediately made to open the whole of the reservation, making no provision whatever for homes for the Indians. It seems to me that is not fair.

There is no recommendation on record, so far as I know, from the Secretary of the Interior or from the Commissioner of Indian Affairs in favor of this proposition. It has been reported against adversely, if I am correctly informed, by Commissioner after Commissioner

and by Secretary after Secretary. The office has been opposed to it all the time on the ground that it is not treating the Indians fairly or justly.

In this connection, I desire to ask the Secretary to read a report made by Colonel Randlett, a lieutenant-colonel in the Army, who for years has been assigned for duty as Indian agent at this reservation. I have a copy of a report made by him to the Commissioner of Indian Affairs, which I will ask to have read, as well as a copy of a letter directed to the Commissioner. I ask that the Secretary read them for the information of the Senate.

The VICE-PRESIDENT. The Secretary will read as requested.

The Secretary read as follows:

UINTAH AND OURAY AGENCY,
*White Rocks, Utah, March 1, 1897.*

SIR: With a desire to aid the honorable Commissioner of Indian Affairs in obtaining information relating to the present and prospective condition of the Uncompahgre Utes in connection with the proposition to open their reservation for settlement, I most respectfully submit as follows regarding my experience with these Indians, and my opinion with reference to providing advantageously for their future welfare. In the fall of 1886 the military post of Fort Du Chesne was established midway between the Uintah and Ouray agencies; and in April, 1887, I was assigned to duty there as commanding officer, with the understanding that it was supposed the peace of the surrounding country could be best preserved by the moral effect of the presence of the troops that were stationed at the fort for the avowed purpose of protecting the reservation rights of the Indians from the rapacity of unprincipled and lawless white people.

In 1893 the duties of acting agent at this agency were added to those of post commander. About this time it was competently decided that the Indians residing thereon had no vested rights in the lands of the Uncompahgre Reservation, but were simply occupants of United States



lands reserved under order of President Arthur, January 5, 1882, and that they were liable to be removed from such occupany at the pleasure of Congress. Consequently the hopes which these Indians had been encouraged to entertain, that they would eventually derive benefits from mineral leases of lands on this reservation, could never be realized. Knowing this, and from what had been observed during seven years, of the determination of the people who were seeking to gain possession of the asphaltum mineral deposits, it became my duty as agent for these Indians to design for their relief and to work up to the line planned. The situation showed that these Indians had been cruelly wronged by the commissioners that removed them from Colorado, under the treaty of 1880; that instead of locating them on Grand River in Colorado and in Utah, as they had been instructed, they forced them far beyond that vicinity, to the junction of Green and White rivers in Utah; that although they had been intrusted with hundreds of thousands of dollars provided by Congress for locating these Indians on agricultural lands, furnishing them with houses to live in, and providing them with implements of husbandry, etc., not a single Indian did they locate on agricultural land, not a single habitable house did they have constructed; and nothing remained in 1893 to show what these commissioners had accomplished beyond the getting of these Indians out of Colorado and dumping them in a locality which has proven an arid waste in summer with deathly frigid climate in winter, where, without sufficient shelters, the scanty clothing and meager rations furnished by the Department had been inadequate to prevent want and starvation, reducing their number to nearly one-half of what it was when they were brought from Colorado.

Upon careful personal exploration, competently assisted, of the bottom lands on Green River referred to by the Ute Commissioners in their report to their chairman, November 21, 1881, and published in the report of the Commissioner of Indian Affairs for that year, it was

found to be perfectly impracticable to attempt to make use of any of these lands for farming purposes, and that the report of these commissioners that "these bottom lands can be easily irrigated and made available by inexperienced labor" was a misrepresentation of facts, and that the Government had, since the date of that report, spent more than $25,000 attempting to provide for irrigating that same land without attaining the least success.

Further investigation showed that there could not be found on the whole of the Uncompahgre Indian Reservation proper 10,000 acres of land that could be brought under cultivation at any justifiable expense.

Having discovered that by some agreement appertaining to the work of the Ute commissioners of 1880 provisions had been made for locating a portion of the Uncompahgres upon certain lands belonging to the Uintah Reservation, "along the Du Chesne, from its junction with the Green River up to a point 8 miles above the mouth of Uintah," I decided to commence locating them there.

[713] The land of the river bottom comprised within the limits described available for irrigaiton does not exceed 15,000 acres. It was evident that sooner or later arrangements would have to be made to obtain more lands from the Uintah Reservation upon which to settle the Uncompahgres, if they were ever to be provided with farming lands for homesteads in Utah, and that preparation for this arrangement should be made at once. Some four or five families having already gone 20 miles above the 8-mile point on the Du Chesne, and located there without objection from the Uintah Reservation Indians, I concluded it would be best to encourage others to follow them, and, with the assistance of Lieut. L. M. Koehler, of the Ninth Cavalry, commenced a survey of the bottom lands of the Du Chesne as far up as the Uncompahgres had located, the result showing that by providing and maintaining seven main canals water could be taken from the Du Chesne and Uintah rivers (one canal from the



east side of the Uintah) sufficient to cover all lands from the 20-mile point named above down to the confluence of the Du Chesne with the Green River, estimated at 30,000 acres at least. After adopting this plan, I was able to obtain funds from the Department from time to time to continue this work.

The canals or main ditches are provided with substantial head gates. The longest and most important of these canals was taken out from the Du Chesne 10 miles above the bridge on the Price road. The head gate is just above where the first Uncompahgres located. It runs 2 miles below the bridge, and there the waste water flows to the river. It covers 16,000 acres of good agricultural land. Above the confluence of the Du Chesne and Uintah rivers there are now located twenty-two familities of the Uncompahgres.

The heads of these families have been supplied with good, comfortable houses, and given the stipulated allotment allowance of agricultural land. These homesteads are all fenced with cedar posts and barbed wire in a manner that will last forty years, the fences running on sectional lines as per recorded official survey.

Water ditches and laterals have been provided, so that these farms are amply supplied with water for irrigation. On eighteen of these good crops were harvested last season, and each from 5 to 40 acres were seeded to lucerne, which will supply hay next season. All these families are living in houses provided for them, and are enjoying comfortably equipped homes, to which they are constantly, in their own way, adding improvements.

For the benefits of these Indians a fine school plant has been established. It is located 3 miles above the point where the Uintah and Du Chesne meet, comprises three two-story brick buildings, one being used for study and recitations, one for boys' dormitory, the other for girls' dormiotory, general mess hall, and quarters for female industrial teachers. The other buildings are a two-story frame laundry, a storehouse for property, a playhouse or

gymnasium for boys, a stable for animals, and a fine residence for the agency physician. One-half mile from the school the Episcopal denomination has established a mission, and has erected and completed to the finish a beautiful chapel (that would be so called in any rural district) and a neat college for the resident missionary. The missionary people are doing good work there, and are very popular with the Indians, both old and young.

I am daily expecting to be relieved from duty as acting Indian agent, and in submitting this my last report referring to the Uncompahgres wish to urge upon the Department the great importance of having the work that has been commenced, as reported herewith, energetically continued upon the lines established. The most important feature to be considered is the care and keeping of the water ditches. The rivers from which they are taken are always greatly swollen in the spring, and for a few years there will be danger of the head gates being destroyed; the soil through which all the main canals pass is light and washes away easily, so that the water courses are liable to be obstructed by drifting sands; these interests will require the attention of a competent, reliable man for superintendent of water ditches to be added to the list of employees allowed for the Ouray Agency, and I recommend that such a position be established at a salary of $1,000 per annum, and that the place be given to John McAndrews, who has been employed at the Ouray Agency as chief herder and chief of police during the past twelve years. McAndrews has assisted in the work of surveying and constructing the water improvements from the commencement; he is a man of excellent judgment, an all-around useful man on the agency, capable of performing any work that emergency requires. He knows every Indian of the reservation well, is a man of excellent moral character, and has great influence among these Indians; indeed, the Indians think better of him than any other living white man, and he can do better with them than any other person can.



It is to be regretted that the appropriation for the coming fiscal year is to be insufficient to insure a continuation of constructions for these Indians as extensively as during the past year. There is on hand material, consisting of logs, for a few more houses, and posts and wire for three or four more 160-acre tracts. There is on hand to my credit in the Deseret National Bank, at Salt Lake City, $2,000, reserved for expense of repairs on irrigating canals during the present spring. Of this money, $1,000 belongs to Uintah Agency and $1,000 to the Uncompahgres.

It will be absolutely necessary during this spring to expend this money for the purpose for which it was furnished, and I trust that the authority required for this may be granted to my successor at a very early day. These Indians have been led to believe that the Uncompahgre Reservation was given to them absolutely, to occupy and hold under the same conditions that the Uintah Reservation is owned by the Indians residing thereon. How they will receive the opening of their reservation on the provisions of Senator CANNON's amendment to the Indian appropriation bill no one can tell.

I am of the opinion that if this proposed measure becomes a law more trouble will be experienced from the whites than from the Indians. There are a few White River Utes, residing on the lands where the largest deposit of asphaltum is located, that it will be hard to appease. How far their desperation may lead them, or how far it will extend among other Indians, I make no prediction. The Uncompahgres have always been peacefully inclined, and I am firmly convinced, if proper provisions are made for locating them according to the plans herein named, that under the management of a judicious and energetic agent, assisted by the trained and faithful employees that I leave him, the Uncompahgres will accept the situation peaceably, and that no serious trouble with them need be experienced.

I regret that I am unable to forward an outline map with this report, but Mr. E. E. White, of the Interior

Department, will be able to explain with regard to all locations.

Very respectfully,

JAMES RANDLETT,
*Lieutenant-Colonel, U.S.A., Acting U.S. Indian Agent.*

The honorable COMMISSIONER OF INDIAN AFFAIRS,
*Washington, D.C.*

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UINTAH AND OURAY AGENCY,
*White Rocks, Utoh, March 7, 1897.*

SIR: I have the honor to request the consideration of the Department to the amendment of the Indian appropriation bill providing for the opening of the Uncompahgre Indian Reservation, which passed Congress March 3, 1897, and which failed to become law by its not receiving the approval of the President.

As published in the newspapers of the country, this amendment ignores entirely the rights and interests of the Indians residing on a reservation which was created for their exclusive benefit by proclamation of a President of the United States, which proclamation when considered in just reasoning appears unquestionably as intended to accord and secure to the Uncompahgre Utes an abiding place where they could not be molested or interfered with in their right of occupancy, and which right of occupancy should last until the General Government should carry out and complete the promises and stipulations contained in the treaty of 1880, under provisions of which they gave up their land in Colorado and were removed to Utah.

I have been stationed among these Indians ten years, the last four years of which time serving as their agent, and from my personal knowledge they have all this time been patiently awaiting the fulfillment of the promise made to them by the Government in treaty referred to, that they should be provided with homes and agricultural



land for the establishment of homes where they might hope to become self-supporting and fitted for citizenship in civilized communities. The amendment referred to implies that some of these Indians have been allotted land on their reservation, and that it would be possible under provisions already made to locate the remainder of the band before the 1st of January, 1898; when the truth is that not a single Indian has been allotted an acre of land on the Uncompahgre Reseravtion, and that no provision exists whereby such allotment could possibly be made between present time and time set in the amendment for the general opening of this reservation.

Had the Indian appropriation bill referred to become a law, the effect of this amendment would have been to permit the Indians residing on the Uncompahgre Reservation to be overrun and completely dispersed by asphaltum prospectors and claim locators, and every semblance of justice and fair dealing on the part of the Government in dealing with their interest would have been outraged. Admitting that these Indians have no vested rights in the lands of their reservation, as their former agents have believed and have taught them to believe they possessed, I am sure that the Congress of the United States, if properly informed in the premises, will never enact laws for the purpose of banishing them out of Utah or for evading strict compliances with treaty stipulations made with them.

I therefore, in behalf of these Indians, as their agent, beg that this communication may be referred for the consideration of the proper committees of the two Houses of Congress, with recommendation from the honorable Commissioner of Indian Affairs that no law be enacted for the opening of the lands of the Uncompahgre Indian Reservation for settlement by whites, excepting such portions of it as may be strictly classed mineral, until the Indians for whose benefit said reservation was set apart shall have been provided with homestead remunerations promised them for giving up their lands in Colorado under

treaty of 1880; and until such remunerations are made the opening of their reservation shall be confined to the limits described by the Commissioners appointed under act approved August 15, 1894, as mineral land not required for allotment to Indians as homesteads.

It is thought appropriate to add that of the 2,000,000 acres (estimated) within the limits of the Uncompahgre Reservation only small parts here and there are good grazing lands, on which the Indians keep their small bunches of cow stock, sheep, and ponies, and that in all the scattered patches of agricultural land there are not 10,000 acres capable of being brought under cultivation by irrigation at a reasonable expense.

Very respectfully,

JAMES F. RANDLETT,
*Lieutenant-Colonel, U.S.A., Acting U.S. Indian Agent.*

The honorable COMMISSIONER OF INDIAN AFFAIRS,
*Washington, D.C.*

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UINTAH AND OURAY AGENCY,
*White Rocks, Utah, March 23, 1897.*

SIR: I have the honor to submit, as additional to my report of 15th instant that on the 4th of March, 1897, there were more than thirty location notices placed upon the lands of the Uncompahgre Indian Reservation, signed by Thomas Lloyd as agent, and that among the names of the persons so located appear those of Heber M. Wells, James T. Hammond, and Arthur Brown. Mr. Lloyd is known as State mine inspector of Utah, Heber M. Wells is governor of Utah, James T. Hammond is secretary of state, and Arthur Brown is supposed to be ex-United States Senator from Utah.

I consider this additional report, if not very important, very interesting in connection with the sentimental pleadings that have recently been made before the Congress



of the United States about the hazards and hardships that were experienced by the poor prospectors that discovered the mines in question, and as indicating what to expect for results if the locations made upon this reservation during the past two years are not annulled by an act of Congress.

Very respectfully,

JAMES F. RANDLETT,
*Lieutenant-Colonel, U.S.A., Acting U.S. Indian Agent.*

The honorable COMMISSIONER OF INDIAN AFFAIRS,
*Washington, D.C.*

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Mr. JONES of Arkansas. Mr. President, I have no extended argument to make on this question. I have asked that the official reports of Lieutenant-Colonel Randlett, who has been in charge of this reservation as Indian agent for years, shall be read for the information of the Senate. He states that there is not one single square inch of this land allotted to any Indians, and yet the closing paragraph of the proposed amendment is that—

> On and after January 1, 1898, all of said reservation unalloted to Indians shall be open to public entry under the land laws of the United States.

It may as well be stated at once that it is to open the entire reservation, which is to be taken out from under these Indians, they to be driven away from their homes on the technical pretext that they have not a legal title to the land.

There are a number of instances where Indians are on land held under Executive order, but there is no place, I think, where the idea would be tolerated for a moment of driving the Indians off of their reservation simply because they were allotted to the locations they occupy by an executive order of the President.

There is, as I said in the beginning, as I understand it, no recommendation, and has been none from any Secretary of the Interior or Commissioner of Indian Affairs, recommending that this legisaltion be had. They have reported against it. It has been protested against by the officers of the Government. I suppose there [714] is no official report here by the Commissioner of Indian Affairs against the opening of this reservation, for the reason that his opinion has not been asked when there has been a proposition to put this legislation in appropriation bills or other bills.

I do not believe that the amendment ought to be adopted, but I will leave the matter with the Senate.

Mr. CANNON. Mr. President, except for the misrepresentation which has taken place concerning this question in another official body of the Government, it would be scarcely fair to detain the Senate at this time with any considerable presentation of the views of the proponents of the amendment. But, under the circumstances, it is due to the people who inhabit the State of Utah, and it is more especially due to the Senate of the United States, which has on more than one occasion approved an amendment of this character, that some full showing of the facts should be made.

I join with the Senator from Arkansas in a desire that no injustice shall be done to the Indians who inhabit the Uncompahgre Reservation; but, from a somewhat intimate knowledge of the situation there, I am at liberty to disagree with him as to the effect which the amendment, if enacted into law, would have upon the welfare of the Uncompahgre Utes.

In the firs place, no Secretary of the Interior and no Commissioner of Indian Affairs has ever reported against this method of settling the question. I beg the pardon of the Senator from Arkansas when I say he is distinctly in error in making the assertion with which he closed his remarks. On the contrary, the whole conduct of the Indian Office toward this question, so far as any conduct



has been made public, has been in the direction of securing the very result and by the very method proposed in this amendment.

It is true, sir, that there have been no allotments of lands to the Indians, but ample time is accorded under the amendment to make them. Every document which is presented here, every argument which has been made, indicates beyond the peradventure of a doubt that there are but 10,000 acres of agricultural lands within that vast domain of 2,000,000 acres.

Mr. JONES of Arkansas. Do I understand the Senator from Utah to say that the Indian Office was in favor of the amendment?

Mr. CANNON. I said that all that we have ever heard from the Indian Office would indicate that they were in favor of the method and the result proposed by the amendment.

Mr. JONES of Arkansas. I would be perfectly willing to let the amendment go over until to-morrow morning, and if the Indian Office shall recommend that it be adopted, I shall withdraw all opposition to it.

Mr. CANNON. There seems to be some occult intention in the mind of the Administration with regard to the Uncompahgre Indian Reservation, which we have never been able to discover. It has never yet been brought forward in an official recommendation to Congress.

Mr. COCKRELL. Will the Senator from Utah permit me to ask him a question?

Mr. CANNON. Certainly.

Mr. COCKRELL. How long has the Indian Office had the right and power to allot these lands to the Indians?

Mr. CANNON. Every since August, 1894.

Mr. COCKRELL. For nearly three years?

Mr. CANNON. To answer the inquiry of the Senator from Missouri fully, I will state that the Indian Office has expended $16,000 of the public funds in a professed

attempt to segregate and allot these lands, and not an allotment of one square inch of land has ever been made within the reservation. The commission appointed by the President under authority of law to expend the money for that purpose was furloughed more than a year ago, and there still remain funds in the hands of the Indian Office with which to carry on just such work as this, because the Indian appropriation bills contain general appropriations to be expended by the Commissioner of Indian Affairs for the allotment of lands in severalty in execution of the numerous statutes which are on the books.

Mr. President, a brief history of the situation may serve to enlighten the minds of Senators and demonstrate that instead of our proposing to rob the Indian or to rob the Government we are but reiterating the demand of citizens of the United States who are unjustly withheld from their own.

In 1882, by Executive order, there was set apart a tract of more than 2,000,000 acres of land in the eastern part of Utah as a so-called reservation for the Uncompahgre Utes, who had been removed from Colorado somewhat against their will. By the adroit manipulation of commissioners then in charge of the removal, the Indians only went upon this land as a halfway house, as a stopping place, thinking that some time they would acquire lands in severalty in some locality approved by them.

The Indians have remained there from that day to this without any serious attempt to allot their lands in severalty—blanket Indians, every one among them, buck, squaw, and papoose—furnishing an inducement to agents and officials of the Government to keep them in their present condition and prevent an allotment of the land in severalty, because, as the record will prove, there are some rather fat pickings for men who handle the Government funds and do not perform the service which they are appointed to perform in the expenditure of Government funds.



An illustration of the manner in which this question has been treated by the agents is furnished by the document which was read here, the communication from Lieutenant-Colonel Randlett, who says that the Indians had been taught to believe that the minerals in this reservation belong to them. By whom had they been taught that astonishing thing? Certainly by their agents; by the people who had access to them. The Indians only went upon this ground against their own remonstrance, never deeming for a moment that it belonged to them; but as time passed on men had a selfish interest in teaching to the Indian that he had some inalienable right to this property and that he must defend it; and the Indian is used as a shield.

The Indians never had any title to this ground. The money which the Indians received from the sale of their lands in the State of Colorado, at 12½ cents per acre, is now on deposit with the Government subject to the order of the Utes. One reason why none of these lands have been allotted in severalty is because the Indians refused to pay $1.25 an acre for this worthless land. It is just precisely the kind of land described in the communication from Lieutenant-Colonel Randlett, and the Indians do not want it.

The communication from Lieutenant-Colonel Randlett speaks of the extravagance of commissions. One commission was appointed to remove these Indians and establish homes for them. They failed to do this duty, according to the testimony of Lieutenant-Colonel Randlett. We have within our own knowledge the work and expenditure of another commission which failed to fulfill the requirements of the law. I make no criticism upon the individual gentlemen who composed the late Ute Commission. They were sent out there at an inopportune time; they were sent out to Utah in the beginning of winter to perform work on the top of the Rocky Mountains, and it was May before the snow was off the ground. The whole work was conducted with the same lack of knowledge on the part of the Interior Department; and, finally, when

they were ready to make their report, it is more than surmise or mere suspicion that they had orders, either written or oral, from the Interior Department of the United States, not to fulfill the law and not to continue the work.

It has been stated upon this floor—and I violate none of the decencies or proprieties of life when I reiterate the charge—that the Secretary of the Interior then in office promised positively to have the proclamation opening this reservation signed, and he failed to do so within the prescribed time or within his term of office; the subordinate officials of the Government, the commission expending this money, I have not the slightest doubt, acted under instructions and according to the example of the officer in chief.

There will be no danger of injury to these Indians if every acre of this land shall be taken. Lieutenant-Colonel Randlett's communication declares that the land is a desert in summer, and frigid, and almost unbearably so, in winter. The Indians hover about the agency, and every acre of land susceptible of cultivation has been designated by the Ute Commission. It can be surveyed, can be allotted to the Indians, and so far as the 900 Uncompahgre Utes are concerned, they can live after the opening of this reservation precisely as they live now, at the agency, in the enjoyment of the revenues from this Government afforded to them by the interest on the money which they received from the sale of their lands in Colorado.

Where is the injustice? Nobody is deprived of anything. If every inch of the ground of the Uncompahgre Reservation were taken, the Indians would not be deprived of that which is theirs. They are tenants at will of this Government upon that land—unwilling tenants at first, and only made willing by the improper conduct and advice of men paid by this Government to administer affairs. The Indians never would have dreamed of remaining an hour longer on the Uncompahgre Reservation



unless they were forced to stay there, if it had not been that men with a selfish end in view had taught the Indians that they had become the rightful owners of the minerals in that property.

There is a reason for all this, Mr. President; there is a reason why the opening of this reservation has been opposed violently in this Chamber, and still more violently elsewhere. The most unreasonable attacks have been made upon this attempt to give to American citizens that which belongs to all citizens, and to open for the benefit of the country that vast storehouse of wealth which belongs to all the people. At the present time the asphaltum business in this country is practically controlled by a trust. We consumed last year in the United States 161,000 tons of aspaltum, mostly brought from Trinidad, although we received some from South American countries and from Cuba, and we got some from Germany and some from France; but the great output was from Trinidad by a company the chief ownership of which is [715] coincident with the chief ownership of a paving company in the United States of America.

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Mr. PETTIGREW. I wish to state to the Senator right in this connection that these Indians are being moved onto the Uintah Reservation and allotted lands upon that reservation as fast as possible. They are being placed where the lands are fit for cultivation.

Mr. JONES of Arkansas. I should like to know where the Senator gets that information.

Mr. PETTIGREW. I get it partly from the letter which the Senator has had read.

Mr. JONES of Arkansas. That letter stated that the Indians were voluntarily going from this reservation to the other. They are not being moved by the Government. There is no home being provided for these Indians outside the reservation.

Mr. PETTIGREW. They are living on this reservation.

Mr. CANNON. Mr. President, I think both Senators are correct. Under the act of 1894 an appropriation of $16,000 was made available for the identical purpose stated by the Senator from South Dakota [Mr. PETTIGREW] in charge of the bill, and whilst it is true that the Government did not remove the Indians in the sense of forcing them to leave the Uncompahgre Reservation and go upon the Uintah Reservation, yet representation was made to them, through their interpreters and through their agents, looking to the gradual transfer of the Indians from the Uncompahgre lands to the Uintah lands. The Indians are voluntarily going over. In point of fact, the agency lies right between the two reservations, and the Uncompahgre Utes have always mingled with the Uintah Utes on terms of fraternity.

The passage of this bill, with this amendment exactly as it appears, will work no injustice to any one Indian; will work no injustice to the people of the United States. It will simply remove a question which has occupied altogether too much of the time of the Senate of the United States; it will remove the power of a trust to control one of the great commodities needed in the civilization of the country.

More than that, Mr. President, it will show that the Congress of the United States has some self-respect. It passed a law in 1894, and the Secretary of the Interior, for reasons best known to himself, but easy of surmise by any man who can read between the lines, chose to violate his word and violate that law, and refused to permit it to be carried out, and the Congress of the United States, now that it is confronted by it, can not do a better thing than to put right on an appropriation bill a provision for the absolute execution of a law which itself was on an appropriation bill.

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[716] Mr. RAWLINS. The act enacted in 1894 was recommended by the Secretary of the Interior, in the first place, in a report to the Committee on Indian Affairs of



the House of Representatives; secondly, in a report of the Committee on Indian Affairs of the Senate, of which, I think, the distinguished Senator was then chairman. This identical bill, containing substantially this provision, was also reported, I believe unanimously, by the Committee on Indian Affairs to the Senate. It enacted that these lands should be allotted to these Indians in accordance with the provisions of a treaty which had been entered into with them in 1880. The policy of allotment was decided, after full discussion, in 1894, by the act which was then passed.

Moreover, this legislation then received the approval not only of the Secretary of the Interior, but of the head of the Indian division in the Interior Department.

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MR. RAWLINS. Mr. President, it may be of assistance to the Senate to understand the precise status of this question. In 1894, in the Fifty-third Congress, a bill was introduced in the House of Representatives, which subsequently was passed into a law on the 15th of August, 1894. Section 20 of that statute provided—

> That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands according to the treaty of 1880, as follows:

Then there is quoted bodily in this section the agreement which was made with these Indians in 1880, at the time they sold their lands to the United States, in connection with other bands of Ute Indians in the State of Colorado. The confederated bands owned in Colorado 12,000,000 acres of land. As the result of the sale of those lands they realized something like $1,700,000; and, in accordance with that same agreement, if those Indians took their allotments in Colorado upon their reservation,

they were to receive them without consideration. If they got lands from the United States off their reservation, their agreement provided that they should pay for the lands at the rate of one dollar and a quarter per acre. The commissioners having charge of this matter virtually forced the Indians into Utah upon these lands.

In 1882, by Executive proclamation, the Uncompahgre Indian Reservation was set aside. They were to use it in sufferance. The question of the title or interest of these Indians to these lands was referred by the Committee on Indian Affairs of the House of Representatives to the law officers of the Interior Department. After a careful examination, those officers reported both to the House of Representatives and to the Senate that these Indians had no interest in these lands; that they were mere tenants at sufferance; that the Government had a right to make allotments of the lands to them within the reservation or off the reservation, but that, in accordance with their express agreement with the Government, they should be required to pay at the rate of one dollar and a quarter an acre for the lands that might thus be allotted to them.

The Secretary of the Interior approved this legislation and recommended it. It was passed. The commissioners were directed—and this was mandatory—to make these allotments, and an appropriation of $16,000 to defray the expenses was provided in that same bill. As soon as the allotments were made, the lands were to be thrown open for settlement. That is the situation of those lands of these Indians at the present time. The President or the Secretary of the Interior may at any time by Executive proclamation—and it is their duty under the provisions of this act—declare these lands open to entry under the public-land law to do just what this bill provides.

The distinguished Senator from Arkansas [Mr. JONES] states that this legislation has not been submitted to the Interior Department for its consideration or report. He is certainly mistaken upon that subject. For more than



six months this very matter was under the consideration of the Indian Bureau, of the Secretary of the Interior, and of both branches of Congress. It was fully discussed both in the House of Representatives and in the Senate. After such discussion the Senate and the House decided that these Indians ought to take their lands in severalty, and that the unallotted lands should be thrown open to entry under the public-land law. In respect to the asphaltum or mineral lands, it was provided that they should be disposed of substantially, almost precisely, as is provided in the pending amendment to this appropriation bill.

The only necessity for this amendment grows out of the fact that there has been apparently a deliberate attempt on the part of [717] the executive officers of the Government to thwart and defeat the positive direction of the legislative department. The Secretary of the Interior, while he recommended the passage of this law and approved it in the first instance, after it had been enacted, appointed commissioners, and then, in the instructions which were given to those commissioners, as shown by the report made on yesterday morning by the present Secretary of the Interior, proceeded, by his instructions, virtually to tell the commissioners not to do that which the law said in mandatory terms they should do.

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On the 16th day of January, 1896, there was passed through the House of Representatives a demand upon the Interior Department for information as to why the law had not been executed. The answer of the Secretary of the Interior is shown in Document No. 191, House of Representatives, Fifty-fourth Congress, first session. The answer was so completely unsatisfactory that at a later time, in March, 1896, by resolution of this body, the Secretary of the Interior was requested to inform the Senate for what reason the nonagricultural and unallotted lands of the Uncompahgre Indian Reservation had not

been restored to the public domain and proclaimed open to entry and location, as prescribed by sections 20 and 21 of the act of Congress approved August 15, 1894. The answer of the Secretary, under date of March 10, 1896, was designated at the time as not being a reply, but an evasion. Every effort was made to get a frank and candid expression from the Interior Department. Personal visits were paid, official communications were sent, but absolutely no information was reported to the Congress of the United States sufficient in any degree to answer the request of Congress.

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In 1880 we purchased from the Ute Indians in Colorado their reservation and agreed to pay a certain price for it, the money to [718] be deposited in the Treasury of the United States and expended for their benefit. In 1883 we moved those Indians over to Utah. The agreement was that we should move them to some point in Utah where there were agricultural lands which they could cultivate. We put them upon the country where they now reside. The President issued a proclamation setting apart 2,000,000 acres of land pending the selection of their allotments.

* * * *

So we waste the money of the Government and the money of the Indians, when in reality—and I shall move such an amendment in the appropriation bill—we ought to have no allotting agents whatever. When these lands are properly surveyed, the agent can allot the Indians under his charge, and there is no necessity for allotting agents and commissions to go out and locate the Indians. The American settler goes upon the frontier and takes his land. The Indian agent can designate the allotment for the Indians, if the land is properly surveyed and marked, and every bit of this work can thus be done. There is no trouble [719] about it at all. I can designate a man who can go and allot every Indian, if there is land



for him to take for farming purposes, and do it between now and the 1st day of July, and get the best land there is upon the entire reservation; and there will be no question about it. If the Indians had taken this land, if it had been fit for the purpose, and if they had been willing to have $1.25 of their money diverted to pay for each acre, the allotment of this land would have been made long ago. There is no injustice to the Indians in this matter. Full and complete justice can be done to them and will be done to them.

* * * *

[720] * * * The facts are, as I happen to know by examination of this question over and over again, that the Indians want to live with the Uintahs. They are allied to them by blood. They belong to the same great generic family; they are all Utes. They do not want to live on the Uncompahgre Reservation of which we are now talking. There are only 10,000 acres of it, and they are separated from their people. They want to go back amongst the Uintahs. A great number of them are there now. There is no necessity for any Government order to remove them. They roam over that whole country at will. As the Senator from South Dakota [Mr. PETTIGREW] said, ample time is given by the amendment to the Government of the United States to make such rules and adopt such a line of conduct in the interests of humanity as may be necessary; and that is the whole of it.

* * * *

[725] INDIAN APPROPRIATION BILL.

Mr. PETTIGREW. I move that the Senate proceed to the consideration of the Indian appropriation bill.

The motion was agreed to; and the Senate, as in Committee of the Whole, resumed the consideration of the bill (H.R. 15) making appropriations for the current and contingent expenses of the Indian Department and for

fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1898, and for other purposes, the pending question being on the amendment reported by the Committee on Appropriations, to insert on page 66, after line 25:

> That the mineral lands of the Uncompahgre Indian Reservation in the State of Utah are hereby declared open to public entry under the mineral-land laws of the United States, and no one person shall be allowed to make more than one claim on lands containing gilsonite. And on and after January 1, 1898, all of said reservation unallotted to Indians shall be open to public entry under the land laws of the United States.

* * * *

CONGRESSIONAL RECORD—HOUSE
APRIL 22

[814] The next amendment of the Senate was read, as follows:

> On page 68, after line 13, insert the following:
>
> "That the mineral lands of the Uncompahgre Indian Reservation in the State of Utah are hereby declared open to public entry under the mineral land laws of the United States, and no one person shall be allowed to make more than one claim on lands containing gilsonite. And on and after January 1, 1898, all of said reservation unallotted to Indians shall be open to public entry under the land laws of the United States."

Mr. SHERMAN. I move that the committee recommend nonconcurrence to this amendment.

* * * *

Mr. RICHARDSON. Then the only difference between the item in that bill and the present provision is that the



number of claims which may be taken by one individual is now reduced to one.

Mr. SHERMAN. I think so. I have not compared the two provisions word for word; but I think that is the only difference.

Mr. LACEY. Mr. Chairman, the original act in regard to the Uncompahgre Reservation was passed in August, 1894; and it provided that a single person might take two claims of gilsonite land, neither claim, however, exceeding 10 acres. That law is in force now, and the Secretary of the Interior may at any time open up the Uncompahgre Reservation to settlement and to the location of claims under the mineral-land law, including deposits of gilsonite, elaterite, and similar substances, provided the number of claims taken by any one person be limited to two.

The Indian bill which passed in the last Congress, and which was not approved by the President, increased the number so as to allow four claims to be taken. The proposition which now comes to us from the Senate reduces the number of claims to one for each person, but leaves some doubt as to the size of the claim. It provides that each individual may take one claim under the general mineral-land law, but whether the provision of the act of 1894 limiting the size of each claim to 10 acres would apply in this case is a matter in considerable doubt.

I wish to call the attention of the Committee of the Whole to reports made by two Secretaries of the Interior—one in 1895 by Secretary Smith, and the other in 1896 by Secretary Francis. I believe we ought not to concur in this amendment. I call attention to page 38 of the report of the Secretary of the Interior in 1895; and with the consent of the committee, I should like to print a part of that report in my remarks, as this question is almost certain to come before the House again upon the conference report, and this information in the RECORD may be found convenient to the House for reference.

Mr. SAYERS. I hope the Committee of the Whole will give permission for printing those reports.

Mr. LACEY. I ask unanimous consent that I may be permitted to print that part of the report of 1895 referring to this matter, and also extracts from the report made in 1896.

The CHAIRMAN. The gentleman from Iowa [Mr. LACEY] asks leave to print in the RECORD certain portions of two reports. Is there objection?

There was no objection.

The following are the parts referred to:

* * * *

[817] * * * In view of what the gentleman has said respecting the title of the Indians to the Uncompahgre Reservation, and the character of their occupancy, perhaps it may not be inopportune to advert briefly to the history of Congressional legislation upon this question and executive proceedings in regard to the opening of this reservation.

I wish to say, to remind the members of the committee, that this is not the first time this question has been under consideration by the legislative branch of the Government. In 1894 a law was passed by Congress, mandatory in its terms, which provided for the opening of the Uncompahgre Reservation in the State of Utah. That law provided for the appointment of a commission consisting of three persons to allot in severalty whatever agricultural lands might be on the reservation and needed for allotment in severalty to the Uncompahgre Indians.

A further provision in that enactment was that the President of the United States, by appropriate proclamation, should open the mineral and agricultural lands to settlement under the mineral and land laws of the United States; but, strange to say, the President of the United States, in the face of this mandatory statute and notwithstanding the fact that the then Secretary of the Interior provided the necessary proclamation for opening the reservation, refused to sign the same, and because the President of the United States refused to perform his duty



and carry into effect the enactments of Congress, supplemental legislation has been deemed necessary.

In the previous discussion it was remarked, as I am told, by the gentleman from Missouri [Mr. BARTHOLDT], in regard to this law of 1894, that the Secretary of the Interior, and perhaps some others who were connected with the enforcement of the provisions of that legislation, ought to have been impeached for a violation of a duty which the statute plainly enjoined upon them. Now, Mr. Chairman, the report of the commission appointed by the President pursuant to authority given in the act just referred to, for the purpose of segregating lands from the reservation for the Indians, discloses the fact that the Uncompahgre Indians do not desire to take allotments upon this reservation under the terms of that act, and in fact from the reports which have been submitted by the Department of the Interior and the Indian Bureau it appears that they have no desire to take allotments upon the Uncompahgre Reservation under any conditions.

* * * *

[818] Mr. KING. Mr. Chairman, as I was about to remark, the reports which have been made (and they have been numerous) indicate conclusively that the Uncompahgre Reservation is practically valueless as a permanent abiding place for the Indians constituting this tribe. They have refused to live there, and by some amicable arrangement which has been entered into by the representatives of the two tribes, a number of the Uncompahgres have received allotments on the Uintah Reservation, where homes have been built for them, and they are now upon the high road to civilization and prosperity. There are only about 10,000 acres of land upon the Uncompahgre Reservation that can be made to produce agricultural crops. This has been clearly marked out, and could easily and without delay be allotted if desired, or by natural objects could be designated and segregated from the residue and given to the Indians.

It seems to me, gentlemen, that there can be no objection to opening this reservation on the ground that it is required as an abiding place for the Indians. As I have observed, the reports indicate conclusively that it is not fitted as an abiding place. The climatic as well as the physical conditions render it inhospitable and forbidding. The geological reports indicate that most of the land is so broken and sterile as to be incapable of cultivation. And the commissioners have stated that it is an arid waste in summer and a frigid zone in winter. The commissioners sent out under the act of 1894 reported that by reason of the frigidity of the climate and the aridity and sterility of the soil there was but a small portion of the reservation susceptible of reclamation and irrigation, so that the Indians do not desire this as an abiding place. It would be inhuman to permanently or even tentatively locate this entire tribe on this mountainous desert. During past discussions of this measure some gentlemen have raised their voices in defense of the Indians.

I join with them in advocating a policy that will protect the Indians and preserve them and their possessions from dishonest persons. In fact, Mr. Chairman and gentlemen, it is notorious that the people of Utah in all their vicissitudes have manifested for the red man a kindness and affection which have obviated difficulties and brought the two races into harmonious relations. Speaking as a Representative of Utah, I say we are as solicitous for the welfare of the red man as any of our Eastern brethren; and when we desire the opening of the Uncompahgre Reservation, it is not because we are opposed to the interests of the red man or to giving him a permanent abiding place.

The Uintah Reservation is a magnificent valley. It possesses large areas of desirable land, upon which there is ample room for the Uintah tribe and for the Uncompahgre Indians. There are less than 1,000—to be accurate, 926—members of the Uintah tribe to-day, including adults and children. So that it is apparent that, according to the terms of the treaty of 1880, but a very limited



amount of land would be required for them; and it is stated in the various reports submitted upon this question that the Uintah tribe desire the commingling of the Uncompahgres with them, desire that the Uncompahgres shall take lands upon their reservation and become more closely identified in their mutual efforts to advance their interests and attain a higher civilization.

So it would seem there can be no objection to the opening of the Uncompahgre Reservation upon the ground that the Indians require the land. I come now to the objection urged by the gentleman from Iowa [Mr. LACEY]. It seems to me, Mr. Chairman, there is a misapprehension on the part of some gentlemen living upon the broad, fertile prairies and the magnificent hills and paradisic valleys of the East as to the character of the land that we have in the West. They seem to think that we must have an Elysian land that "blossoms as the rose" and yields the wealth of Indus without the labor of man.

If it does blossom as the rose, it is because of the herculean efforts, the heroism, the almost unendurable hardships and trials that have been undergone by those hardy men and women who have settled upon those deserts and sterile wastes, and who planted the standard of civilization in those mountain fastnesses. And I think our brethren of the East ought not to interpose any objection to a policy that will redound to the general good and advantage of our common country.

* * * *

[833] The CHAIRMAN. The time for debate has expired. The question is on the motion of the gentleman from Texas [Mr. BAILEY] to concur with an amendment, which has been read.

The question was taken; and on a division (demanded by Mr. BAILEY) there were—ayes 40, noes 72.

Accordingly, the motion of Mr. BAILEY was rejected.

The CHAIRMAN. The question now is on the motion to concur.

The question being taken, it was decided in the negative.

The CHAIRMAN. The question now is on the motion to nonconcur, and the gentleman from Iowa [Mr. LACEY] offers the following instructions.

The Clerk read as follows:

> The Committee of the Whole recommend that the conference committee be instructed to insist upon a provision for leasing the gilsonite mineral lands, with such limitations and restrictions as will prevent the control of the said mineral by trusts or combinations of any kind; such leases to be for limited amounts and for limited periods upon a royalty to the Government.

The CHAIRMAN. The Chair will state that the committee having determined in the negative on the motion to concur, that is equivalent to a vote to nonconcur or a recommendation to nonconcur, and the question now is on the proposition of the gentleman from Iowa [Mr. LACEY], which has just been read.

* * * *

CONGRESSIONAL RECORD—HOUSE.
APRIL 23

[840] Mr. SHERMAN. Mr. Speaker, I move that a committee of conference be appointed on the disagreeing votes of the two Houses.

Mr. LACEY. Mr. Speaker, there was an instruction reported back to the House.

The SPEAKER. That question should come up after the committee is appointed. The gentleman from New York [Mr. SHERMAN] moves that a committee of conference be appointed on the disagreeing votes of the two Houses.

The motion was agreed to.

Mr. LACEY. I ask the Clerk to report the proposed instructions.



The Clerk read as follows:

> That the conference committee be instructed to insist upon a provision for leasing the gilsonite mineral lands, with such limitations and restrictions as will prevent the control of the said mineral by trusts or combinations of any kind; such leases to be for limited amounts and for limited periods, upon a royalty to the Government.

The SPEAKER. The Chair desires to say with regard to this question of instructing the conference committee that it is, perhaps, a question whether the committee have a right to make such a recommendation as that, but it can be made by the indorsement of the individual member.

Mr. KING. I desire to make the point of order that that instruction by the committee was not proper; that they had no authority to instruct the House.

The SPEAKER. The gentleman from Iowa [Mr. LACEY] can move it as an individual member.

Mr. LACEY. Then I move this instruction at this time.

The SPEAKER. The gentleman from Iowa moves the following instruction, which will be reported to the House.

The motion of Mr. LACEY, as above set forth, was again read.

Mr. LACEY. I move to strike out the word "amounts," and to insert in lieu thereof the word "areas." I think that is perhaps the better word.

Mr. BARTHOLDT. I rise to a parliamentary inquiry.

The SPEAKER. The gentleman will state it.

Mr. BARTHOLDT. Is it in order to make such a change in the resolution reported by the Committee of the Whole if unanimous consent is not obtained for that purpose? I think it requires unanimous consent.

The SPEAKER. Upon what ground? It is a proposition to instruct the committee of conference. It is not usual to instruct the committee at the first conference, it is true, but the House has undoubtedly the right so to do.

Mr. LACEY. I move the previous question on this resolution.

The SPEAKER. The gentleman from Iowa asks for the previous question.

The question was taken on ordering the previous question; and the Speaker announced that the ayes seemed to have it.

Mr. KING. Division, Mr. Speaker!

The House divided; and there were—ayes 70, noes 5.

* * * *

CONGRESSIONAL RECORD—HOUSE
MAY 13

[1070] INDIAN APPROPRIATION BILL

Mr. SHERMAN. Mr. Speaker, I desire to present a conference report on the Indian appropriation bill.

Mr. SAYERS. Mr. Speaker——

The SPEAKER. Does the gentleman from New York yield to the gentleman from Texas?

Mr. SHERMAN. Yes, sir.

Mr. SAYERS. Just a moment. Mr. Speaker, I shall not object to the consideration of the conference report, provided that the gentleman from New York will let the matter which refers to the gilsonite deposits lay over until next Monday.

Mr. SHERMAN. The matter with reference to the gilsonsite claim is not included in this report.

Mr. SAYERS. I understand so; but I would like to have an agreement with the gentleman that when we shall have considered the report, the other matter, which has reference to the gilsonite deposits, shall lay over until Monday.

Mr. SHERMAN. Mr. Speaker, this was my desire in the matter: That after we had disposed of this conference report, to then move to concur in the Senate amendment relating to the gilsonite deposits with an amendment, which amendment is one that has been substantially agreed upon by the conferees, and provides for the opening up



of these lands under leases, with the payment of a royalty, which is substantially what the House indicated the other day as being the line on which they desired the matter disposed of. I wished to make that motion as soon as this report was disposed of; but I shall not press it if the gentleman from Texas desires to have it stand over until next Monday.

Mr. SAYERS. Yes; I would like the amendment upon which the conferees have agreed printed in the RECORD for the information of the House, and let it stand over until next Monday.

Mr. SHERMAN. I ask unanimous consent, Mr. Speaker, to print in the RECORD the amendment which I should have proposed. and which I will propose on next Monday.

The SPEAKER. That is the understanding. If there be no objection, the agreement will be indorsed by the House. [After a pause.] The Chair hears none.

The proposition is as follows:

*Provided,* That the title of all lands containing gilsonite shall remain in the United States, and any citizen of the United States may make an entry of a tract of land containing gilsonite of the area of one mining claim for the purpose of mining gilsonite; and such entryman, his heirs or assigns, shall be allowed to retain possession of said claim and take gilsonite therefrom upon paying to the United States an amount to be fixed by the Secretary of the Interior, not exceeding 75 cents for every ton of gilsonite mined or taken from said claim. If at any time the claimant or occupant of any gilsonite mine entered under the provisions of this act shall enter into any combination with any other person or persons to limit the production of gilsonite or increase the price of the same, the Secretary of the Interior is hereby directed to take possession of said mine, and all the rights of the claimant, his heirs or assigns, therein shall be forfeited, and the Secretary of the Interior shall take possession of the same. The Secretary of

the Interior is hereby authorized and directed to make all necessary rules and regulations to carry this section into effect.

* * * *

CONGRESSIONAL RECORD—HOUSE
MAY 17

[1110] INDIAN APPROPRIATION BILL

Mr. SHERMAN. I send to the desk a conference report on the remaining disagreement of the two Houses upon the amendments of the Senate to the Indian appropriation bill.

The Clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate numbered 10 to the bill (H.R. 15) making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1898, and for other purposes, having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate numbered 10, and agree to the same with an amendment as follows: In lieu of the matter inserted by said amendment insert the following:

"That the mineral lands of the Uncompahgre Indian Reservation, in the State of Utah, are hereby declared open to public entry under the mineral-land laws of the United States: *Provided*, That the title of all lands containing gilsonite shall remain in the United States, and any citizen of the United States may make an entry of a tract of land containing gilsonite of the area of one mining claim for the



purpose of mining gilsonite; and such entryman, his heirs or assigns, shall be allowed to retain possession of said claim and take gilsonite therefrom upon paying to the United States an amount, to be fixed by the Secretary of the Interior, not exceeding 75 cents for every ton of gilsonite mined or taken from said claim. If at any time the claimant or occupant of any gilsonite mine entered under the provisions of this act shall enter into any combinaiton with any other person or persons to limit the production of gilsonite or increase the price of the same, the Secretary of the Interior is hereby directed to take possession of said mine, and all the rights of the claimant, his heirs or assigns, therein shall be forfeited, and the Secretary of the Interior shall take possession of the same. The Secretary of the Interior is hereby authorized and directed to make all necessary rules and regulations to carry this provision into effect."

And the Senate agree to the same.

JAMES S. SHERMAN,
CHARLES CURTIS,
*Managers on the part of the House.*

R. F. PETTIGREW,
F. M. COCKRELL,
*Managers on the part of the Senate.*

The following statement of the House conferees was read:

Statement to accompany conference report No. 2 on the Indian appropriation bill.

This conference report disposes of the only remaining amendment, to wit, amendment No. 10, which has reference to the gilsonite deposits in the Uncompahgre Reservation in Utah. The agreement is in accord with the apparent sentiment of the House when the matter was discussed there. It provides for

the title of the lands remaining in the United States and the gilsonite being mined under regulations prescribed by the Secretary of the Interior, and the United States is to receive a royalty of 75 cents per ton.

This report finally disposes of the Indian appropriation bill.

Mr. SHERMAN. Mr. Speaker, the report just read summarizes what this amendment does. It provides that the United States shall retain title of these lands on which gilsonite deposits are found, and leases may be granted under which the gilsonite may be mined pursuant to regulations which the Secretary of the Interior shall prescribe, royalty being paid to the United States at the rate of 75 cents per ton. This, Mr. Speaker, is, we believe, in substantial accord with the apparent sentiment of the House when this matter was under discussion on, I think, the 20th of April last, and when it was proposed to offer instructions to the conference committee.

* * * *

[1120] The previous question was ordered.

The question being taken on the motion to agree to the conference report, on a division (demanded by Mr. LACEY) there were—ayes 36, noes 73.

Accordingly the conference report was rejected.

Mr. SHERMAN. Mr. Speaker——

The SPEAKER. For what purpose does the gentleman rise?

Mr. SHERMAN. To make a motion in reference to this conference. I desire to move that the House further insist upon its disagreement to the Senate amendment, and ask for a further conference.

The SPEAKER. The gentleman from New York moves that the House still further insist on its disagreement and ask for a further conference.

Mr. KING. Mr. Speaker, I desire to offer a substitute, if I am recognized by the Speaker.



The SPEAKER. The question must be taken first upon agreeing to the conference.

The question being taken, the motion was agreed to.

Mr. KING. Mr. Speaker——

Mr. LACEY. I move that the conferees be instructed to endeavor to secure an agreement substantially in the form of the proposition which was read in my time a while ago, and which I now renew and ask the Clerk to read.

The SPEAKER. The gentleman from Iowa [Mr. LACEY] moves that the conferees be instructed to endeavor to secure an agreement substantially in the form of the proposition which the Clerk will report.

The Clerk read as follows:

> *Provided*, That the title of all lands containing gilsonite shall remain in the United States, and any citizen of the United States may make an entry of a tract of land containing gilsonite of the area of one mining claim of 10 acres for the purpose of mining gilsonite; and such entryman, his heirs or assigns, shall be allowed to retain possession of said claim and take gilsonite therefrom upon paying to the United States an amount to be fixed by the Secretary of the Interior for every ton of gilsonite mined or taken from said claim. If at any time the claimant or occupant of any gilsonite mine entered under the provisions of this act shall enter into any combination with any other person or persons to limit the production of gilsonite or increase the price of the same, the Secretary of the Interior is hereby directed to take possession of said mine, and all the rights of the claimant, his heirs or assigns, therein shall be forfeited, and the Secretary of the Interior shall take possession of the same. The Secretary of the Interior is hereby authorized and directed to make all necessary rules and regulations to carry this section into effect. It is the intention hereby to prevent the acquisition of such claim for the purpose of in any manner

withdrawing the same from use, and the failure to operate any claim for a term of five years shall work a forfeiture of such claim; and no person, partnership, association, or corporation shall acquire and hold by assignment, or in any other way, more than ten of such claims; and a violation hereof shall work a forfeiture of the claim so assigned or attempted to be acquired, and power to declare such forfeiture is hereby given to the Secretary of the Interior.

This section shall also apply to elaterite, asphalt, or other like substance: *Provided further,* That the Secretary of the Interior, in making rules and regulations to carry out the purposes of this act, is authorized and directed to make such limitations and conditions in the terms of the entries as will carry out the purposes of this act, and for that purpose shall limit the time of such entries to terms of not exceeding twenty years.

* * * *

The SPEAKER. The gentleman asks for the previous question.

The question being taken on ordering the previous question, on a division (demanded by Mr. KING) there were—ayes 64, noes 66.

Mr. LACEY. Tellers, Mr. Speaker.

Tellers were ordered; and the Speaker appointed Mr. LACEY and Mr. KING.

The House again divided; and the tellers reported—ayes 70, noes 65.

* * * *

CONGRESSIONAL RECORD—SENATE
MAY 18

[1130] INDIAN APPROPRIATION BILL

Mr. PETTIGREW submitted the following report:



The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate numbered 10 to the bill (H.R. 15) making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1898, and for other purposes, having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate numbered 10, and agree to the same with an amendment as follows: In lieu of the matter inserted by said amendment insert the following:

"The Secretary of the Interior is hereby directed to at once allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the lands of said Uncompahgre Reservation not therefore allotted in severalty to said Uncompahgre Utes shall, on and after the 1st day of April, 1898, be open for location and entry under all the land laws of the United States."

And the Senate agree to the same.

R. F. PETTIGREW,
F. M. COCKRELL,
*Managers on the part of the Senate.*

J. S. SHERMAN,
CHARLES CURTIS,
*Managers on the part of the House.*

Mr. PETTIGREW. I ask that the conference report be agreed to.

The report was concurred in.

* * * *

[1209] Mr. SHERMAN. Just one word, Mr. Speaker. I will not detain the House long. The gentleman from Wisconsin [Mr. COOPER] says that I said this report was better than the last. I did so state, Mr. Speaker, that it was better for the Indians. He quotes the report of Major Randlett, in which he says that the original proposition, as passed by the Senate, was an outrage upon these Indians. I thought so, Mr. Speaker, and that is why I opposed it just as strenunously as I could, all the way through. It was an outrage upon the Indians. This report is not. This provision takes ample care of all the rights of the Indians before it disposes of a foot of this land, and that is what we want; that is what we of the Indian conference committee of this House have been contending for all the way through.

By this amendment the rights of the Indians are cared for. Every single Indian is given his allotment in severalty before the balance of this land is opened up under the general land law of the United States. Now, my friend from Alabama [Mr. UNDERWOOD] says that this proposition that is now here is not so good as the one that came in the other day. Perhaps my friend is right about that; but let me call his attention to the fact that the proposition which came in the other day was rejected by this House by a majority of more than two to one, and that thereafter, when the gentleman from Iowa [Mr. LACEY] offered a proposition as an instruction, which I believed was better even than what we succeeded in getting in the conference committee—when he offered his instruction to the conferees, the House rejected that.

Mr. Speaker, the conferees have done their best to carry out the wishes of the House and have brought back here a proposition which we thought was in accord with their wishes, and have seen it stricken down by a vote of two to one. We have seen on two different occasions the House refuse us instructions as to what we should do; and we have done the very best we could and have finally come here with a proposition which opens these



lands under all the land laws of the United States; and for the life of me I see no reason why this particular body of land in the State of Utah should be opened up differently from what all the other lands of the United States have been opened up in the last twenty-five years. I think the proposition is a fair one, Mr. Speaker, and I hope the House will adopt it; and I ask for a vote.

The SPEAKER. The question is on agreeing to the conference report.

The question was taken; and the Speaker announced that the noes seemed to have it.

Mr. SHERMAN. Division, Mr. Speaker.

The House divided; and there were—ayes 56, noes 64.

So the conference report was disagreed to.

Mr. SHERMAN. Mr. Speaker, I move that the House concur in the Senate amendment; and I desire to say in making that motion that I do not make it in the hope that the House will pass it in just that form, but I do it in the hope that the proposition will be so amended that something will be agreed upon, so that the Senate will recede and accept the desires of the House.

Mr. CANNON. May I ask the gentleman a question?

Mr. SHERMAN. Certainly.

Mr. CANNON. I desire to know if the conferees of the House believe that the Senate would accept an amendment ceding these lands to the State of Utah?

Mr. SHERMAN. I will say this, Mr. Speaker, that the chairman of the conference committee on the part of the Senate said to us the other day that if this report was returned, that whatever came back to the Senate as the will of the House he should move that the Senate accede to it, and then, if that motion failed, he would then move that the Senate recede from the entire proposition.

Mr. LACEY. Now, Mr. Speaker, I move to substitute for the motion of the gentleman from New York the following.

The SPEAKER. The gentleman from New York moves to recede from the disagreement and concur in the Senate amendment, and the gentleman from Iowa moves to concur with the following amendment, which the Clerk will read.

The Clerk read as follows:

> Concur in Senate amendment numbered 10 by striking out the same and substitute the following in lieu thereof:
>
> "The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located or belonging to the Uncompahgre Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the 1st of April, 1898, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.
>
> "And the title to all of the said lands containing gilsonite, asphaltum, elaterite, or other like substances is reserved to the United States.
>
> "And the Secretary of the Interior is authorized to lease the said reserved lands containing said minerals; said leases to be upon such royalty as the said Secretary may determine to be reasonable, and said leases to be for such periods, not exceeding ten years, as he may determine; and regulations and limitations shall be provided by the Secretary as to the amount of lands embraced in each lease, or as to assignments of said leases, so as to prevent any monopoly of said minerals; and the Secretary will make all such rules and regulations as may be necessary for the purpose of carrying out the objects of this act."



The SPEAKER. The question is on agreeing to the amendment proposed by the gentleman from Iowa.

* * * *

CONGRESSIONAL RECORD—HOUSE
MAY 20

[1210] The SPEAKER. This is not an amendment to the conference report, It is a proposition that the House recede from its non-concurrence and concur with an amendment, and the question is on the amendment.

The question being taken, on a division (demanded by Mr. KING and Mr. HARTMAN) there were—ayes 74, noes 42.

* * * *

CONGRESSIONAL RECORD—SENATE

[1253] INDIAN APPROPRIATION BILL

The VICE-PRESIDENT. The Chair hears no objection to taking up the conference report on the Indian appropriation bill. The report has been read.

Mr. PETTIGREW. The report has been read. I ask the Senate to concur in the conference report.

The VICE-PRESIDENT. The question is on concurring in the report.

Mr. CANNON. Mr. President——

The VICE-PRESIDENT. Does the Senator from Utah desire to speak on the pending question?

Mr. CANNON. I do, briefly.

The VICE-PRESIDENT. The Senator from Utah will proceed.

Mr. CANNON. Mr. President, it would be an injustice to the courtesy of the Senate if we were to object to the adoption of the conference report. At the same time it would be unfair if a statement were not made at this time of the injustice which is wrought to the people living in the State of Utah and all the people of the country so

long as the status shall be maintained which will exist upon the adoption of the conference report.

The most valuable minerals of the Uncompahgre Indian Reservation will be withheld from public use during the whole time of the existence of the law which will be created by the passage of this bill and its signature by the President. It is a wrong to all the people of the United States, because the development of asphaltum and gilsonite and elaterite lands in various States of the Union has resulted in a great reduction in the price of paving in this country and a further development will still further reduce that cost to the cities of the United States.

It is only with a desire to bring to the attention of the Senate the fact that the status to be created by this bill should be remedied by further legislation at the earliest possible time that I rise at the present moment. I shall vote for the adoption of the conference report because the Senate has given to us the utmost consideration, and the conferees of both Houses have dealt with this question in an understanding way, and have made various futile efforts to get the two Houses to agree upon a proposition that should be just to all.

The VICE-PRESIDENT. The question is on concurring in the conference report.

The report was concurred in.

* * * *

CONGRESSIONAL RECORD—HOUSE
JUNE 3

[1468] Mr. SHERMAN. I think this conference report will take but a moment. We have given way twice for other matters, anyhow.

The SPEAKER. The Chair will recognize the gentleman from Texas [Mr. STEPHENS] as soon as this matter is disposed of. The Clerk will read the conference report and then the statement of the House conferees.

* * * *



Mr. SHERMAN. Mr. Speaker, this report leaves the gilsonite and asphaltum deposits still undisposed of. The title of all lands containing any of these deposits, about which we have had so much discussion heretofore, is retained in the United States, and the matter is left for future action by Congress.

Mr. SAYERS. There is, then, no legislation whatever in this bill respecting those lands?

Mr. SHERMAN. None whatever, so far as these deposits are concerned. I move the adoption of the report.

Mr. SHAFROTH. I will state to the gentleman from Texas [Mr. SAYERS] that there is legislation in this concerning these lands, but it withdraws from entry entirely, and reserves the title in the United States. I am opposed to it, but nevertheless I do not see that we can make anything by fighting it further at this time.

Mr. SHERMAN. I ask for a vote, Mr. Speaker.

The SPEAKER. The question is on agreeing to the conference report.

The conference report was agreed to.

On motion of Mr. SHERMAN, a motion to reconsider the last vote was laid on the table.

* * * *

**Act of June 7, 1897, 30 Stat. (LD 49)**

[87] The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.

And the title to all of the said lands containing gilsonite, asphaltum, elaterite, or other like substances is reserved to the United States.

* * * *



**Excerpts from 35 Cong. Rec. (1902) (LD 70)**

CONGRESSIONAL RECORD—SENATE
APRIL 4

[3650] The amendment was agreed to.

The next amendment was, on page 50, after line 22, to insert:

> That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family 80 acres of agricultural land which can be irrigated and 40 acres of such land to each other member of said tribes, said allotments to be made prior to October 1, 1903, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided,* That persons entering any of said land under the homestead law shall pay therefor at the rate of $1.25 per acre: *And provided further,* That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or a permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have the preferential right to locate under the mining laws not to exceed 640 acres of contiguous mineral land, except the Raven Mining Company, which may locate 100 mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied,

first, to the reimbursement of the United States for any [3651] moneys advanced to said Indians to carry into effect the foregoing provisions, and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of $70,064.48 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior.

Mr. STEWART. In line 16, page 51, after the word "or" I move to strike out the article "a" and insert "such."

The SECRETARY. On page 51, line 16, it is proposed to strike out the article "a" where it occurs before the word "permit" and insert in lieu thereof the word "such."

The amendment to the amendment was agreed to.

Mr. STEWART. After the word "interior" in the tenth line, page 52, I move to insert "to be immediately available."

Mr. PLATT of Connecticut. Ought there not also to be a clause like this: "in fulfillment of treaty obligations;" for that is what the money is paid for as I understand? I do not care anything about it. It can be fixed in conference. But I understand it is to pay the Indians what they claim we have not paid them under our treaty obligations.

Mr. STEWART. I do not think those words need be in there. Although the Indians did not consent to the treaty, the Government took the land and allotted it. The treaty was not ratified. It was a treaty on one side, but the Government availed itself of it. It amounts to a treaty obligation as we have considered it.

Mr. PLATT of Connecticut. I do not ask to have it go in.

Mr. ALLISON. Before this amendment is finally disposed of I hope the Senator from Nevada will give some explanation as respects the details. On its face it looks like a very important amendment, although it may not be.



Mr. CLAPP. I desire to call the chairman's attention to the fact that the agent who has gone out to negotiate the treaty told me it was quite important that the bill should separate the two items—$10,000 under the agreement of May 24, 1888, and $60,064.48 under the treaty of January 8, 1898. I have not been able to see the chairman since.

Mr. STEWART. Has the Senator prepared an amendment making that separation?

Mr. CLAPP. I have not one prepared. I can prepare one.

Mr. QUARLES. This is a very important matter, and I ask that the amendment be temporarily passed over.

Mr. CLAPP. That will do.

Mr. STEWART. I think that is the best way.

The PRESIDING OFFICER (Mr. LODGE in the chair). The amendment will be passed over temporarily.

Mr. RAWLINS subsequently said: I ask that we may be permitted to return to the amendment just passed over. I would suggest an amendment which I think would be satisfactory, and we may then dispose of the matter.

The PRESIDING OFFICER. The Chair understood the amendment had been passed over until the conclusion of the reading of the bill; but, of course——

Mr. STEWART. It has been passed by temporarily and will be called up again. Some of the Senators who wanted to hear an explanation of the amendment have left the Chamber. So we had better not act on it now.

Mr. RAWLINS. Very well.

* * * *

[3711] The PRESIDENT pro tempore. The next amendment which was passed over will be stated.

The SECRETARY. On page 50, after line 22, the committee propose to insert:

That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute In-

dians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family 80 acres of agricultural land which can be irrigated and 40 acres of such land to each other member of said tribes, said allotments to be made prior to October 1, 1903, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of $1.25 per acre: *And provided further*, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior, to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have the preferential right to locate under the mining laws not to exceed 640 acres of contiguous mineral land, except the Raven Mining Company, which may locate 100 mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions, and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of $70,064.48 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the



direction of the Secretary of the Interior, to be immediately available.

Mr. STEWART. The Senator from Utah [Mr. RAWLINS] has an amendment to that amendment, which he desires to offer in pursuance of suggestions made here.

Mr. RAWLINS. I offer the amendment which I send to the Secretary's desk, to come in after line 10 of the amendment of the committee, on page 52.

The PRESIDENT pro tempore. The amendment of the Senator from Utah [Mr. RAWLINS] to the amendment of the committee will be stated.

The SECRETARY. At the end of the committee amendment on page 52, line 10, it is proposed to insert:

> Said item of $7,064.48 to be paid to the Uintah and White River Utes to cover claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and for which the Government has received from said Uncompahgre Indians money aggregating $60,064.48, and the remaining $10,000 claimed by the Indians under an act of Congress detaching a small part of the reservation on the east and under which act the proceeds of the sale of the lands were to be applied for the benefit of the Indians. This amount to be advanced as a compromise in settlement of these claims and to remove all objection of the Indians to taking allotments and the opening of said reservation.

The PRESIDENT pro tempore. The question is on the amendment of the Senator from Utah [Mr. RAWLINS] to the amendment reported by the committee.

The amendment to the amendment was agreed to.

* * * *

**35 Cong. Rec. (1902) (LD 84)**

CONGRESSIONAL RECORD—HOUSE
JUNE 16

[6868] AMENDMENTS TO INDIAN APPROPRIATION ACT

Mr. SHERMAN. Mr. Speaker, I move to suspend the rules and pass with an amendment Senate resolution No. 105.

The joint resolution (S. 105) supplementing and modifying certain provisions of the Indian appropriation act for the year ending June 30, 1903, was read as amended, as follows:

In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of 80 acres to each head of a family and 40 not allotted to Indians or used or reserved by the Government, or occupied for school purposes, shall be opened to exploration, location, occupation, and purchase under the mining laws.

In addition to the allotment of severalty of lands in the Walker River Indian Reservation in the State of Nevada, the Secretary of the Interior shall, before any of said lands are opened to disposition under any



public-land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public-land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of 80 acres to each head of a family and 40 acres to each other Indian, and no more. The grazing land selected and set apart as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named.

In so far as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory and Oklahoma Territory, shall be made in conformity to the provisions of the act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and other general acts amendatory thereof or supplemental thereto, and shall be subject to all the re-

strictions and carry all the privileges incident to allotments made under said act and other general acts amendatory thereof or supplemental thereto.

The item of $70,064.48 appropriated by the act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said act shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

The SPEAKER. Is a second demanded on the motion to suspend the rules?

Mr. RICHARDSON of Tennessee. I demand a second.

Mr. SHERMAN. I ask unanimous consent that a second be considered as ordered.

There was no objection.

The SPEAKER. The Chair recognizes the gentleman from New York [Mr. SHERMAN]——

Mr. RICHARDSON of Tennessee. I hope the gentleman will recognize the gentleman from Arkansas [Mr. LITTLE] to control the time in opposition to the motion.

The SPEAKER. The time will be controlled on the one side by the gentleman from New York [Mr. SHERMAN] and on the other by the gentleman from Arkansas [Mr. LITTLE].

Mr. SHERMAN. Mr. Speaker, this is the same resolution that I attempted a week or two ago to have passed by unanimous consent, and to the consideration of which objection was made. The resolution relates to provisions of the Indian appropriation act, which were inserted as amendments in the Senate after it had left this House. To those provisions the House conferees objected as a whole, and also objected to certain parts of them as they were finally agreed upon. But it became necessary for the House conferees to concede what the Senate conferees



demanded [6869] in order to reach an agreement, as it is frequently necessary for the conferees of the one House or the other to yield to those of the other.

After the conference report had been agreed to in both Houses and the bill had gone to the President, a conference, at which I was not present, was held between certain of the conferees and the President of the United States, at which the President raised certain objections to these amendments, and in order to meet the objections of the President this resolution was prepared. It was a concession by the Senate conferees and the Senate, a recession from the position they had taken when the amendments were originally passed and when the conference report was finally agreed to.

The resolution is so plain in its terms that I need not recite its provisions. What it amounts to is this: The Senate has receded from the position which it took originally and which its conferees thereafter took when the conferees met, and the Senate has agreed to this recession and now the House is asked to coincide.

Mr. RICHARDSON of Tennessee. What evidence have we that the Senate has agreed to recede?

Mr. SHERMAN. They have passed this resolution.

Mr. RICHARDSON of Tennessee. This is a Senate resolution?

Mr. SHERMAN. Certainly.

Mr. RICHARDSON of Tennessee. They have agreed, then, to recede from their amendments and passed this resolution?

Mr. SHERMAN. That is the position exactly.

Mr. RICHARDSON of Tennessee. As I understand the gentleman, the President, notwithstanding his objections to the Indian appropriation bill, approved it with these obnoxious provisions in it.

Mr. SHERMAN. Well, I think he approved it with the expectation, if not the understanding, that this resolution would be passed. It had passed the Senate when he signed the appropriation bill.

Mr. RICHARDSON of Tennessee. Was there any contract to that effect?

Mr. SHERMAN. Oh, certainly not. No individual could make a contract for the House. I say the bill was approved with that expectation. The Senate had passed this resolution; and when the President told me he would approve the Indian appropriation bill, I frankly told him that I believed the House would agree to the resolution. I did not undertake to make any such agreement on the part of the House by any manner of means; I simply stated my belief.

Mr. RICHARDSON of Tennessee. This is the third joint resolution, is it not, which has been passed to amend the Indian appropriation bill since it was passed?

Mr. SHERMAN. The second.

Mr. RICHARDSON of Tennessee. This is the third, if I mistake not.

Mr. SHERMAN. No; a resolution did come in here before, but it never passed; and it is embodied in this resolution. Resolution No. 2 is embodied in this. It never did pass the House.

Mr. RICHARDSON of Tennesee. But this is the third effort to amend that act?

Mr. SHERMAN. The gentleman is right. This is the third effort to change the bill as originally passed.

Mr. RICHARDSON of Tennessee. Mr. Speaker, I would like to ask the gentleman if he can give us the assurance now that this is the final one?

Mr. SHERMAN. Mr. Speaker, I can give the gentleman my assurance that this is the last one I shall offer.

Mr. RICHARDSON of Tennessee. Then, as I understand it, this makes the bill satisfactory to the President.

Mr. SHERMAN. I understand so. Mr. Speaker, I reserve the balance of my time.

Mr. STEPHENS of Texas. Mr. Speaker, I would like to ask the gentleman a question.

The SPEAKER. Does the gentleman yield?

Mr. SHERMAN. Yes.



Mr. STEPHENS of Texas. I will ask the gentleman if he will agree to an amendment in line 8, page 3, adding the word "Oklahoma"——

Mr. SHERMAN. That is included in the resolution as it has been read.

The SPEAKER. The gentleman from Arkansas [Mr. LITTLE] is recognized.

Mr. LITTLE. Mr. Speaker, the pending resolution within itself is unobjectionable as far as I am concerned, and has been explained by the gentleman from New York [Mr. SHERMAN] as I understand it. The original objection to the passage of this resolution, so far as it emanated from myself, was inspired by the hope that the President would see his way clear to veto the appropriation bill. I was encouraged in that hope by a statement that appeared in one of the city papers—whether authorized or not I do not know—that the President was objecting to the concessions made to the lessees on the Uintah Reservation. I believe that the President ought to have vetoed the original bill on that account. I hoped that that objection, added to the provisions covered by this resolution, would inspire him to do that, which I believe to be a very proper thing for him to do.

I believe the ratification of the leases and privileges given to the Florence Mining Company can not be justified on any ground. They have made no investitures; they simply get that which ought to belong to the public generally when this reservation is opened. For that reason, and having no further opportunity or hope of securing that result, I do not feel justified in going further in opposition to this particular resolution. I regret very much that the President in his wisdom did not see proper to put his pungent pen against that bill and expose what I believe to be the infamy wrapped up in the Florence Mining Company lease and the Raven Mining lease. These two companies get a vast concession. They are practically, as I believe, one company, as I have been led to believe since the passage of the original bill. The presidents are the

same, the secretaries are the same, and I think the companies are the same; that is, the same in interest, if not the same in name. I believe it is a bad precedent, I believe it is unholy, I believe the requirement of these leases, as I indicated before in my remarks, can be tracked with infamy from their very beginning up to this very morning, and I do not believe that Congress ought to have approved the measure; and when it did approve the bill with these provisions in it, I believe the President ought to have vetoed it, and I regret he has not done so.

Mr. SUTHERLAND. Mr. Speaker, does not the gentleman know that if this reservation had been thrown open, without any provision giving the Florence Mining Company any preferential rights, the Florence Mining Company being acquainted with the reservation property, knowing exactly what they wanted, having the same right to go into the reservation and make locations as any other citizen, which locations would be unlimited in number, whatever is granted to it under this bill is nothing more than a formal concession? In other words, that the Florence Mining Company or their agents, knowing exactly what they wanted to locate, would be naturally put in a better situation to take advantage of the provisions of this bill with respect to locating mining claims than anybody else and would get these 640 acres anyhow. In view of that, I want to ask the gentleman whether he thinks the President of the United States or this House ought to stand in the way of opening a great reservation like that to settlement rather than to give this company what is a mere formal concession to go there and locate 640 acres of land, which they probably would locate anyhow?

Mr. LITTLE. I will be pleased to answer the gentleman. I will say that the very suggestion he makes is one of the strongest possible arguments against the policy of giving permits to prospect and locate leases on Indian reservations.

Mr. SUTHERLAND. I agree with the gentleman. The leasing system is absolutely indefensible.



Mr. LITTLE. I know that the gentleman agrees with me. I know that the gentleman agrees with me that this is as dirty as it can be, if he would but acknowledge it. You want the reservation open. I think it ought to be opened, and in these leases, as written, the very provision reserving to Congress the right to negotiate with these Indians upon the reservation, instead of giving these direct concessions by this law—I admit they are in possession of information they could use when the reservation is opened. Other people may be in possession of that information, but I would not give them this absolute right for more than a year to go in there and locate their claims in advance. If they have the information, which they have gotten, as I believe, infamously, in a large measure, they would have to use that information when that reservation was opened according to the forms of law, and I would not give them an additional year until October, 1903, to go on and further prospect that reservation and increase the advantages that they have over other people.

But that question is behind us, and knowing my friend as I do I verily believe he agrees with me generally that these leases are unfortunate—that it would have been better for the reservation and better for the country if they had never been made—and it would be better for Congress if they had never been approved; but believing as he does, and as many do, that it would be impossible to secure the opening of this reservation and the consent of these Indians in any other way except by ratifying these agreements, I can see why he is willing to take the dose whether it tastes very well or not. That is the situation. These companies hold up the Government, that is what they do. We understand that it is impossible to secure the consent of these Indians under the influence of these lessees in any other way except to recognize their right. I would not do that.

* * * *

**36 Cong. Rec. (1903) (LD 90)**

CONGRESSIONAL RECORD—HOUSE
JANUARY 28

[1387] The Clerk read as follows:

To enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the purposes of so much of the act of May 27, 1902, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year 1903, and for other purposes, as provides for the allotment of the Indians of the Walker River Reservation in Nevada, and the Uintah and White River Utes in Utah, and the joint resolution of June 19, 1902, providing for the allotment of the Indians of Spokane Reservation in Washington, to be immediately available, $175,000.

For the resurvey and marking of the southern and western boundaries of the Uintah Indian Reservation from the initial point on Green River to the intersection of said boundary line with the range line between ranges 6 and 7 east, of Sac and Lake Meridian, Utah, an estimated distance of 135 miles, at $40 per mile, and for the field examination of said resurvey, $6,000.

Mr. BURTON. Mr. Chairman, I move to strike out these two paragraphs. I should like to inquire, in the first place, whether this is reimbursable, and, in the next place, what is the reason for the very large amount here for the allotment of the lands of the Indians of the Walker River Reservation? Also, there is a third inquiry which naturally presents itself: Why should this provision for the Indians of the Walker River Reservation in Nevada, and the Uintah and White River Utes in Utah, and that for the Indians of the Spokane Reservation in Washington be combined in one omnibus provision? Are there separate estimates for the three? If so, why should they be combined?



Mr. SHERMAN. No; it is one estimate, and the estimate is set out in full in the regular report accompanying the appropriation bill, which I presume the gentleman has before him. If he desires, I will have it read from the desk. It is set out in the report.

Mr. BURTON. I should like to have it read if it is brief. How long is it?

Mr. SHERMAN. About one printed page.

Mr. BURTON. I should like to have the Clerk read it, so that it will appear in the RECORD.

Mr. SHERMAN. In the meantime, let me say the three provisions are covered in one item because in the act of last year which made this survey necessary they were all covered in one item.

[1388] Mr. BURTON. Before the reading begins, are these amounts reimbursable?

Mr. SHERMAN. They are not reimbursable. I ask the Clerk to read the letter of the Secretary.

The Clerk read as follows:

DEPARTMENT OF THE INTERIOR,
*Washington, December 3, 1902.*

SIR: I acknowledge the receipt of your letter of the 2d instant, calling attention to an item of $157,000 in the estimate of appropriations for the fiscal year ending June 30, 1904, for the surveying, etc., on the Walker River Reservation in Nevada, and the Uintah and White River Utes in Utah, and $6,000 for the resurvey and marking of the southern and western boundaries in the Uintah Reservation, etc., and in reply to your request to be informed of the "necessity for these appropriations, what is desired to be accomplished by them, and whether or not anything has been done to carry out the law with reference to the Uintah Reservation passed last year," beg to state, as to the last inquiry, that the $70,064.48 provided by the act of May 27, 1902,

to be paid to the Utes, has been so paid, in accordance with the terms of public resolution No. 31, approved June 19, 1902.

On June 6, 1902, estimate for surveying the Walker River, Uintah, and Spokane reservations, and for allotments to the Indians thereon, was hastily made because of the approaching adjournment of Congress, and forwarded to that body through the Senate and House Committees on Indian Affairs, no provisions for these purposes having been made in the Act of May 27, 1902, aforesaid which required allotments to be made to the Indians of those reservations; but no action thereon seems to have been taken beyond a provision in the deficiency act approved July 1, 1902 (32 Stat., 575), which requires the Secretary of the Interior "to cause careful estimates to be made and submitted to Congress at the beginning of its next session for survey of the Walker River Reservation in Nevada, the Uintah Reservation in Utah, and the Spokane Reservation in Washington."

The estimates for these surveys have been prepared and will be immediately forwarded to Congress, the amounts thereof being severally as follows:

| | |
|---|---|
| Walker River | $11,118.75 |
| Uintah | 108,756.00 |
| Spokane | 17,000.00 |
| Total for surveys | 136,874.75 |

To this sum is to be added the amounts required for allotments on the said reservations, as per Department letter of June 6, 1902, viz:

| | |
|---|---|
| Walker River | $4,000.00 |
| Uintah | 12,000.00 |
| Spokane | 2,000.00 |
| Total for allotments | 18,000.00 |

making in all, $154,874.75.



The necessity for this appropriation lies in the fact that the law can not be fully executed without the means to survey the reservation and to make allotments to the Indians thereof, as provided by the aforesaid act of May 27, 1902.

If it is still the wish of Congress that this shall be done, the sum of money above named will necessarily be required to carry the same into effect.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

Hon. JAMES S. SHERMAN,
*Chairman Committee on Indian Affairs,*
*House of Representatives.*

Mr. BURTON. I withdraw the formal amendment.

Mr. SUTHERLAND. Mr. Chairman, I move to strike out the section just read by the Clerk. I do not know whether the amendment of the gentleman from Ohio included that or not. Did I understand that it did?

Mr. BURTON. I did not hear the gentleman's statement.

Mr. SUTHERLAND. Did your motion to strike out include both sections?

Mr. BURTON. From line 4 down to and including line 23.

Mr. SUTHERLAND. The motion was withdrawn. I desire to move to strike out the paragraph just read.

The Clerk read as follows:

> Strike out from lines 16 to 23, both inclusive, on page 35.

Mr. SUTHERLAND. Mr. Chairman, at the last session of Congress we provided for opening the Uintah Indian Reservation. This bill makes an appropriation of a large part of the $175,000 mentioned in the preceding paragraph for this purpose. This is appropriated for making

surveys for allotments and such other surveys as may be necessary to carry that act into operation. If the Uintah Reservation is opened, which I believe it will be, this appropriation of $6,000 for reestablishing the boundary lines of the reservation is entirely useless. The boundary lines have been in their present condition for many years, and if by any mischance the reservation should not be opened it will not hurt to let it wait for another year; and if the reservation is opened it is simply an appropriation of $6,000 without any useful purpose whatever. I think it should be stricken from this bill.

Mr. LACEY. Will the gentleman allow me to ask him a question?

Mr. SUTHERLAND. Certainly.

Mr. LACEY. Whether the reservation is opened or not, is it not necessary to define these boundaries? The adjoining land is private land to-day, and the boundary line becomes a matter of importance; so that if this reservation is finally opened these surveys will not be lost. That much surveying will already have been done, and it will not have to be done again. It will be a starting point for the final survey in the opening of the entire reservation.

Mr. SUTHERLAND. The reservation will be simply restored to the public domain. Of course it can not interfere with the private lands. The allotments that are made to the Indians are made in a part of the reservation entirely away from this line. It seems to me that if the reservation should be opened that that survey would be entirely useless.

Mr. SHERMAN. The fact is that these Indians have claimed for several years that a fraud was perpetrated upon them when this line was laid out. They have alleged that the line was not in fact laid out at all; that the surveyors sent there for that purpose devoted their energies to amusements that suited them while occupying their tents for a while, and that, as a matter of fact, they never ran out the line; and that the white people of Utah have



since claimed the line was wherever they chose, and have maintained it, and because of that fact white persons have encroached very materially upon their reservations.

Now, I do not pretend to say whether or no the contention be true, but I do maintain that we can not afford in our dealings with the Indians, for the sake of saving $4,000 or $5,000, the expense of a survey, to permit them to go on indefinitely with the idea that we quietly sit by as a government and permit the white people to perpetrate a wrong upon them by reason of neglect of duty by the officials we sent there. I think the amendment ought not to prevail.

The CHAIRMAN. The question is on agreeing to the amendment.

* * * *

CONGRESSIONAL RECORD—SENATE
FEBRUARY 14

[2180] The amendment was agreed to.

The next amendment was on page 42, line 18, after the word "dollars," to insert the following proviso:

> *Provided, however,* That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May 27, 1902, and if their consent, as therein provided, can not be obtained by June 1, 1903, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act: *And provided further,* That the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution No. 31, of June 19, 1902, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not ex-

ceed 250,000 acres: *And provided further*, That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May 27, 1902, be, and the same is hereby, extended to October 1, 1904.

The amendment was agreed to.

* * * *



**H.R. Doc. No. 33, 58th Cong., 1st Sess. (1903) (LD 92)**

HOUSE OF REPRESENTATIVES

58th Congress, 1st Session Document No. 33

# GRANT OF LANDS FOR USE OF CERTAIN INDIANS

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## LETTER

From

## THE SECRETARY OF THE INTERIOR,

Transmitting,

## WITH THE COPY OF A REPORT FROM THE COMMISSIONER OF INDIAN AFFAIRS, A RECOMMENDATION FOR LEGISLATION RELATING TO THE UINTA RESERVATION IN UTAH.

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DECEMBER 1, 1903.—Referred to the Committee on Indian Affairs and ordered to be printed

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DEPARTMENT OF THE INTERIOR,
*Washington, November 30, 1903.*

SIR: I have the honor to transmit herewith copy of a report of 23d instant from the Commissioner of Indian Affairs and accompanying paragraph for insertion in the bill making appropriations for the Indian service for the fiscal year ending June 30, 1905, together with copies of correspondence in relation thereto.

This paragraph relates to the Uinta Reservation in Utah, and provides that before any of the lands are opened to disposition under any public-land law that the Secretary of the Interior shall select and set apart for the use in common of the Indians of that reservation, including all Uncompahgre Indians receiving allotments in said reservation of the quantity of lands as provided by public resolution No. 31, of June 19, 1902, one tract not exceeding one township in extent as a timber reserve, said tract to embrace the agency sawmill; one tract not exceeding one township in extent, containing dwarf cedar for fuel and fence posts, and a tract of 160 acres, embracing a vein of coal situated on Farm Creek; and it further provides that the Secretary in his discretion cancel the allotment made to any Uncompahgre Indian within the former Uncompahgre Reservation for which a trust or other patent has not issued, and in lieu thereof allot such Uncompahgre Indians in the Uinta Reservation in quantity as provided in said public resolution No. 31.

This matter has been considered by the Department, and I have the honor to recommend that it receive favorable action by the Congress.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, November 23, 1903.*

SIR: Under date of August 25, 1903, you returned to this office the report of Inspector James McLaughlin of his negotiations with the Uinta and White River Utes of Utah, relative to the opening of the Uinta Reservation as



provided by the acts of May 27, 1902 (32 Stats., 245) and March 3, 1903 (32 Stats., 982); and directed the preparation of the necessary correspondence relative to the setting apart of one township as a timber reserve to embrace the agency sawmill, one township of the dwarf cedar tract to supply the Indians with fence posts and wood fuel, and 160 acres located on Farm Creek as a coal reserve.

Under date of September 9, 1903, Acting Agent Mercer made report upon a communication from Hon. George Sutherland, of Salt Lake City, in regard to the character of the land allotted the Uncompahgre on the former Uncompahgre Reservation. Captain Mercer expressed the opinion that these Indians should be given allotments on the Uinta Reservation, and stated that there is land enough to allot them in addition to the Uinta and White River.

There were 83 Indians allotted on the Uncompahgre Reservation and to allot these 83 on the Uinta Reservation would require not to exceed 5,000 acres.

Congress can undoubtedly authorize you to cancel these allotments, patents not having issued, and I am of the opinion that this authority should be granted.

I have accordingly prepared the draft of an item authorizing the setting apart of the three reserves mentioned, and containing a proviso authorizing the Secretary of the Interior, in his discretion, to cancel any allotment made in the former Uncompahgre Reservation, and to allot to the Indian whose allotment may be canceled lands in the Uinta Reservation in quantity as provided in public resolution No. 31, approved June 19, 1902 (80 acres to head of family and 40 acres to each other person), and have the honor to recommend that the same be transmitted to the Senate Committee on Appropriations and the House Committee on Indian Affairs, with the request that it be inserted in the Indian appropriation bill.

I also transmit duplicate copies of Inspector McLaughlin's report, office report of July 18, 1903, your letter of August 25, 1903, Mr. Sutherland's letter of June 13, 1903, and Captain Mercer's report of September 9, 1903, and inclosures.

Very respectfully,

W. A. JONES,
*Commissioner.*

THE SECRETARY OF THE INTERIOR.

*Paragraph for insertion in Indian appropriation bill.*

That in addition to the allotments in severalty to the Uinta and White River Utes of the Uinta Indian Reservation in Utah, and to the grazing lands to be selected and set apart for the use in common of said Indians and of the Uncompahgre Indians, the Secretary of the Interior shall, before any of the lands of said reservation are opened to disposition under any public-land law, select and set apart for the use in common of the Indians of that reservation, including all Uncompahgre Indians receiving allotments in said reservation of the reduced area provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, one tract not exceeding one township in extent as a timber reserve, said tract to embrace the agency sawmill; one tract not exceeding one township in extent containing dwarf cedar for fuel and fence posts, and a tract of one hundred and sixty acres embracing a vein of coal, situated in Farm Creek: *Provided,* That the Secretary of the Interior may, in his discretion, cancel the allotment made to any Uncompahgre Indian within the former Uncompahgre Reservation and for which a trust or other patent has not issued, and in lieu thereof allot such Uncompahgre Indian in the Uinta Reservation in quantity, as provided in said public resolution numbered thirty-one.

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DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE,
*Uinta Agency, Whiterocks, Utah, May 30, 1903.*

SIR: Under instructions prepared in the Office of Indian Affairs, dated April 27, 1903, approved by the Department April 29, I have the honor to report results of my negotations with the Uinta and White River Utes, of the Uinta Reservation, Utah, under the provisions of the act of Congress of May 27, 1902, as amended by the Indian appropriation act approved March 3, 1903, in reference to the opening of their reservation, the full import of which, as affecting their lands and other interests, I carefully explained to the Indian, and am confident that a majority of them now fully understand the force of said acts quite clearly.

I reached the Uinta Agency on Wednesday, the 13th instant, and on the following morning sent out policemen to notify the Indians to meet me in council at the agency on Monday, the 18th instant, on which latter date our first council was held and at which there were 127 Indians present.

I explained minutely to the Indians, in open council, the provisions of said acts of Congress involving their interests, and repeatedly explained to them during our six days' council the more important features of the law, with a reference to the minutes of councils, transmitted herewith, will show.

Wanrodes alone, of all the Indians who spoke in council, discussed the question intelligently. (See minutes of council, pp. 66 and 67.) The other speakers made little or no reference to the question of accepting allotments under the law, their speeches being chiefly in opposition to opening the reservation, contending that their reservation could not be opened to settlement without their consent; that such was well known by everybody and had repeatedly been told the Indians by Government officials;

and some of the speakers, who have been members of delegations visiting Washington, stated that they were thus advised by officials of the Department during their visit to Washington. (See pp. 15, 21, 27, 43, and 50, minutes of councils.)

The statements, whether true or false, of Indians visiting Washington, are usually believed by their people when relating their experience upon their return home, and in consequence of which, from the above assertions of some of the speakers, it was difficult to bring many of the Indians to understand the full force of this new legislation. Several of the speakers, apart from contending that the reservation could not be opened to settlement without obtaining their consent, said that they should at least have been visited by some Government official and consulted regarding the matter before legislation of such vital importance to them was enacted regardless of their wishes.

The councils were well attended from the beginning and throughout the six days' sessions, but I soon discovered that it was being dominated and controlled by Indians opposed to opening the reservation (chiefly White Rovers, led by Tim Johnson) and which element was deterring persons from expressing themselves whom they feared might favor the proposition. Learning that some of the leading men of the Uinta thought favorably of the proposition and were ready to concur in the provisions of the act, and finding on the evening of the fifth day's council that the opposition was as strong and active as in the beginning, I concluded to hold my final council with them the following day, and therefore announced that I would prepare a paper for signatures and read it to them in full council the following afternoon, so that all assenting to the provisions of the act could sign the instrument of acceptance; that our next meeting would be our last council, and I desired a full attendance so that all might hear the paper referred to read, and also my parting words of advice to those assembled.



Pursuant to Friday's adjournment, the council was reconvened the following afternoon, Saturday, the 23d, for its sixth and last session, with 134 Indians in attendance, whereupon (as shown by the minutes of councils, p. 72) I read and explained the instrument of acceptance which I had prepared, and invited all concurring in the provisions of the act to sign the same, telling them that it would be in the agent's office, open at all times for signers to affix their signatures while I remained at the agency.

I then invited any of the Indians desiring to express themselves regarding the matter to do so, upon which invitation Henry Harris, representing the sentiment of the better-disposed element of the Indians, requested their agent, Capt. W. A. Mercer, U. S. Army, to express himself in reference to the questions before the council, whereupon Captain Mercer, after first addressing me in the name of the Indians, speaking forcibly in their behalf, then spoke to the Indians, giving them good, wholesome advice, as shown by minutes of the council, pages 75 to 80, inclusive. After Captain Mercer had concluded his speech, I addressed a few additional remarks to the Indians, among other things advising them that surveyors would soon be on the reservation surveying the lands preparatory to the carrying out of the provisions of the law which had been enacted; that such surveyors would be upon the reservation by authority of the Government and must not be interfered with, as they would be under the protection of the strong arm of the Government.

My talk in this respect appeared to be well received, and notwithstanding that the Indians feel very sore over this new legislation, I am quite confident that they will not commit any overt act, nor interfere with any person coming on the reservation by proper authority. If the incomers are endowed with common sense, practice fair dealing, and exercise prudence when meeting any of these Indians in the field, they will have no difficulty in getting

along smoothly with them. The Indians deported themselves very commendably throughout our councils, and the best possible feeling prevailed at the final adjournment. A majority of those attending the last council accompanied us to the agent's office and 31 of them signed the paper of acceptance before going home, and others kept coming in from day to day during the past week until 82 have thus concurred in the act. The signers are chiefly Uinta, only 7 White Rivers having signed the paper assenting thereto.

The Uinta Indians are well disposed, and there is little doubt but that the signatures of a majority concurring in the act could have been obtained by remaining at the agency a couple of weeks longer or by canvassing the Uinta settlements of the reservation, but the White Rivers were obstinate and would not be convinced by logical reasoning or argument. Tim Johnson, the leading spokesman of the White Rivers, came to me the second day after the termination of the council and told me that the White Rivers had directed him to tell me that they would give up all claim to the Uinta lands and leave the reservation if the Government would permit them to remove to the Bear River Valley in Colorado. I told him that the proposition was untenable and could not be entertained, but he insisted upon me submitting his request in my report, hence my mentioning it.

The Uinta Agency rolls show 159 Uinta and 121 White River male adults belonging to the Uinta Reservation, a total of 280 male adults; 82 of whom assented to the provisions of the act, as shown by the instrument of acceptance, transmitted herewith, containing their respective signatures; and, notwithstanding that those assenting to the act, as expressed by their signatures, are only a fraction over one-fourth of the male adults of the reservation, I deemed it proper to transmit the same, but with the explanation that the signers were as much opposed to the opening of the reservation without consulting the



Indians as the nonsigners were, but they thus expressed their acceptance of the law to show their good will and readiness to comply with the wishes of the Government. In view of this fact, it appears to me that they should receive some special recognition for their friendly attitude in the premises, and that when the lands are allotted they be permitted to select their allotments on any irrigable lands within the reservation.

In Captain Mercer's appeal for the Indians he set forth the necessity of setting apart a tract of timber land situated northwest of the Uinta Agency, to embrace the agency sawmill, which mill, including planer, shingle and lath machinery, is located about 13 miles northwest of the agency. It is practically new, is in first-class condition, and of great benefit to the reservation at the present time in providing necessary building material which is very much needed by both agency and Indians. I digress to state that I visited this mill and found that it was being well managed and doing excellent work.

From a very fair knowledge of the character of the country embraced in the Uinta Reservation, I submit that I regard the setting apart of a timber reserve as absolutely necessary for the welfare of these Indians who, under the law, must be allotted irrigable lands only, and the irrigable lands of the reservation contain little or no timber.

The bench lands, so called, nearly all of which can be irrigated, are the most desirable lands for farming purposes of the reservation, but they are entirely devoid of timber, and it therefore becomes necessary that the Indian allottees have a timber reserve from which they can obtain building material, fence posts, and fuel, this timber reserve to be held in common or equally apportioned among the allottees.

There is an abundant supply of good pine and cedar timber in the mountains adjacent to the Uinta Agency,

from which the Indians now obtain their building material and fuel; but under the provisions of the act opening the reservation, they will be deprived of all timber except what may be found to be within the tract of land to be reserved for grazing purposes south of the Strawberry River, and from having traveled over that section of country in August, 1901, when examining the Raven Mining Company's mineral locations, under Department instructions, I know that there is very little timber south of Strawberry River within the Uinta Reservation, except in the extreme southeastern corner, about 70 miles from where the principal settlements of the Indians are now located, and where the greatest portion of the allotments will doubtless be made.

In view of the above-stated facts, I respectfully suggest and strongly recommend that a timber reserve of at least one township (6 miles square) be set apart, from which these Indians may obtain building material, the tract suggested to embrace the agency sawmill, also a township of the dwarf-cedar tract near the agency, to supply them with fence posts and wood fuel.

A tract of 160 acres of land, embracing a certain vein of coal, situated in Farm Creek, about 8 miles north by northwest of Uinta Agency headquarters at Whiterocks, should also be reserved for use of the Indians to provide them with fuel.

The contract price of wood at the military post of Fort Duchesne, 14 miles from the Uinta Agency, is $8.50 per cord, and this native coal is $6.80 per ton; hence the importance of the Indians being provided with means of obtaining their fuel without being obliged to buy it, which under the most favorable conditions would be a great hardship to them, and they would scarcely be able to meet the expense.

The absence of timber for building purposes and fuel on the irrigable lands of this reservation make it absolutely necessary that a reasonable tract of timber land



and 160 acres of coal land be reserved for use of the Indians before the reservation is opened for settlement. Should it be found necessary in order to set apart the timber and coal reserves herein recommended, the grazing tract of not exceeding 250,000 acres south of Strawberry River, provided for in the act, might be proportionally reduced.

The reservation of the tracts herein suggested, all of which are mountainous and unsuited for agriculture, need not prevent the lands being prospected over for mineral deposits, should that be a consideration, as all the Indians would need is the privilege of obtaining their supply of building material and fuel therefrom.

It was doubtless an oversight, or from inaccurate information as to the timbered portions and resources of the reservation, that the importance of reserving sufficient timber land for use of the Indians was not provided in the act.

In this connection I would also respectfully recommend that the 250,000 acres of common grazing land be set apart in two or more places, so as to meet the convenience of the Indians of the respective districts.

In conclusion, I desire to state that while the signatures of a majority of the male adult Indians of the reservation were not obtained, I feel that I accomplished all that could reasonably be expected, considering the attitude of the Indians in reference to the matter when I reached the agency, they being then unanimously opposed to the opening of their reservation under the provisions of the act; but through clear explanations of the law and painstaking argument I succeeded in bringing them to understand that their reservation is going to be opened as provided in the act; that its survey will soon be commenced, and when completed allotments will be made to them, after which the residue will be opened to settlement, except the tract of 250,000 acres situated south of Straw-

berry River, which is to be reserved for their common use for grazing purposes. They held out strenuously against accepting this statement as a fact, but were finally brought to understand it fully and clearly, and now accept it, at least passively, with as good grace as is reasonable to expect.

Those of the Indians who signed the acceptance of the act did so, as heretofore stated, to show their good will, and many others would doubtless have signed had there been anything to be gained by their doing so. They fully understood that they were to have lands allotted to them whether they consented to the act or not, and having nothing to lose by refusing to assent to the provisions of the act, they declined to sign and thus became a party to that which was distasteful to them. There is not the slightest doubt, however, in my mind, judging from the courteous manner in which the Indians treated me, and the confidence they have in Captain Mercer, but that they will all acquiesce gracefully and meet the wishes of the Department in the premises.

They are now all diligently employed and appear much happier than when I arrived at their agency on this mission.

I desire to express my appreciation of the valuable assistance rendered me by Captain Mercer, acting Indian agent, and also by Mr. J. F. MacKey, agency clerk, who did my stenographic work, and whose work may be seen by reference to the minutes of councils transmitted herewith.

I am, sir, very respectfully, your obedient servant,

JAMES MCLAUGHLIN,
*United States Indian Inspector.*

The SECRETARY OF THE INTERIOR,
*Washington, D. C.*

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DEPARTMENT OF THE INTERIOR,
*Washington, August 25, 1903.*

SIR: I have considered your letter of 16th ultimo, upon the report of Inspector McLaughlin of his negotations with the Uinta and White River Utes of Utah, relative to the opening of the Uinta Reservation as provided by the acts of May 27, 1902, and March 3, 1903.

As to the suggestions of Inspector McLaughlin for the reservation of one township as a timber reserve to embrace the agency sawmill and one township of the dwarf cedar tract to supply the Indians with fence posts and wood fuel and 160 acres located on Farm Creek as a coal reserve, which seem to be required, I am of the opinion as the legislation governing this matter provides that all the unallotted lands, except the reserved grazing lands of 250,000 acres, shall be opened to public entry on October 1, 1904, it is better that Congress should authorize the setting aside or reserving from public entry the two timber reserves and the coal reserve, and you will please prepare the necessary correspondence for presentation to Congress at its next session.

The inclosures to your letter are herewith returned.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

The COMMISSIONER OF INDIAN AFFAIRS.

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[Sutherland, Van Cott & Allison, attorneys and counsellors at law.]

SALT LAKE CITY, UTAH, *June 13, 1903.*

MY DEAR SIR: I have recently returned from a visit to what was formerly the Uncompahgre Indian Reservation in the eastern part of the State, and while there my

attention was called, by Mr. McAndrews, formerly chief of Indian police, and others, to some of the allotments made to Indians on White River, and I was very much surprised to see the character of land which had been given to these Indians. It is of an exceeding poor quality, sandy, rocky, and barren. Nothing grows upon it except some cottonwoods near the water and sage brush and grease wood. It looked to me to be entirely valueless, even for grazing purposes. I was told that these Indians, when they made the selections, knew absolutely nothing about the value of land. They are like children and are not capable of judging what is best for themselves. They were therefore imposed upon in the matter of their allotments, perhaps without anybody being to blame therefor. I do not know that anything can be done to remedy this situation, but it is a matter which should be remedied if at all possible.

If you think it worth while, and care to have me do so, I will very gladly get detailed statements from people of that locality who are familiar with the situation, and forward them to you.

Very truly, yours,

GEO. SUTHERLAND.

Hon. WM. A. JONES,
*Commissioner of Indian Affairs,*
*Washington, D. C.*

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UINTA AND OURAY AGENCY,
*Whiterocks, Utah, September 9, 1903.*

SIR: In reply to your letter of July 28, I have to report that I have personally visited the Ouray Reservation for the purpose of getting reliable information on the matter referred to. The result of my investigation is that I am convinced that the Uncompahgre Indians should be given allotments on the Uinta Reservation and they



should after a time, or as soon as conditions are suitable, move to these allotments. Based on the belief that it will be impossible to make any allotments on the Uinta Reservation for at least another year, it will probably be better to allow the Uncompahgres to remain as they are for about two years and then move them to their new allotments on the Uinta Reservation.

There is enough land on the Uinta Reservation to allot the Uncompahgres in addition to the Uintas and White Rivers. This will, of course, not leave much land for white settlers. I make the above recommendation for several reasons, the most important of which is that in order for these Indians (the Uncompahgres) to make any advancement in civilization and to engage in industries it is necessary that they should be confined to a comparatively limited area. In this connection the Uintas and White Rivers will be much improved in conditions generally if their allotments were given to them in almost compact form. This would remove the greatest present obstacle to their progress, particularly in education, namely, the manner in which they are scattered over a vast extent of territory, inaccessible in part and very difficult to reach in a majority of cases. If placed in a more compact body, the attendance at the school could be largely increased. As it is now, many of the Indians with their chldren are scattered among the mountains and over an area of 150 miles in extent, and they must be hunted down and brought in. If they were concentrated and centrally located there would be no trouble on this account, and, furthermore, a system of day schools could be established among them which would be very beneficial; likewise their industries could be prosecuted to greater advantage under the supervision of the agency employees, which is now almost an impossibility.

I am satisfied that the Uncompahgres will never advance in civilization unless they are taken from their present resorts and homes and placed where they can

be reached by civilizing influences. To locate them with the Uintas and White Rivers, on the Uinta Reservation, is, in my opinion, the best plan. They will not be willing to accept it. Many of them will sulk and be discontented, as the White Rivers now are, but, for the future good of both these tribes, they should be compelled to pursue the course which is best for that end, and not be allowed to follow the advice of the discontented and ignorant members, who oppose everything tending to their benefit.

Mr. J. A. Robb, for several years clerk at Ouray Agency, and Mr. Wallace Stark, carpenter at Ouray Agency, are familiar with the Uncompahgre Indians, their condition and their needs. I have called upon them for information and I inclose their reports herewith. Referring to their reports in regard to a tract of land which they mention as being so located that it can be irrigated and rendered suitable for locating the Indians thereon, although there are allotments made there already, there is a doubt in my mind as to whether it can be irrigated, or, if irrigated, whether it could be made profitable for the Indians to use. There is a great deal of land in that vicinity which, after it is watered, is of no value and will not produce crops of any kind, but there is a great deal of good land on the Uinta Reservation and enough for all.

Very respectfully,

W. A. MERCER.
*Captain, Seventh Cavalry, Acting United States Indian Agent.*

The COMMISSIONER OF INDIAN AFFAIRS,
*Washington, D. C.*

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UNITED STATES INDIAN SERVICE,
*Ouray, Utah, August 27, 1903.*

SIR: In reply to your letter dated August 18, in regard to Indians who were alloted their land on the Uncompahgre Reservation, I will say—

First. That from what I can learn it was the policy of the alloting commission to allow the Indians their choice of locations, and most of them took advantage of it, but I do not think all of them did.

Second. It is my opinion that few, if any, of the Indians would have an idea of land value; they know that the land should be reasonably level for agricultural purposes, but that is about all.

Third. There is a strip of land on lower White River, about 12 miles long by 2 miles wide, bottom land. I think it is as good land, if not better, than could be found on the Uinta Reserve for agricultural purposes. This land, I understand, is allotted them. There is no water on the land, but I think it is practicable to put in a dam across the river and take the water out on either side. I understand the Government, some years ago, did take the water out some 4 miles up from the mouth of the river, but the ditch never was kept in repair and let go down. The Indians on this land—I do not think it would benefit them to move—but if it can be done, put the water on their land. There are a few Indians that have land on Willow Creek, but there is not sufficient water through the summer season. There is an allotment or so on Bitter Creek that is supposed to be pretty good, but I think is much better for a stock ranch than for agricultural purposes. I understand the land is watered from springs and surrounded by a pretty good range. Where some of the Indians who have a little stock and an allotment of this kind, and wish to stay with it, it would be well for some member or so of the family to have an allotment on some good agricultural land—it might sometime benefit them all. I have no records, but I think there

is several Indians on the Uncompahgre Reserve that have no allotments, but claim where they have been camping.

Fourth. I think very few, if any of the Indians would care to move; a few might be persuaded, who has land that can not be watered, to take up good agricultural land elsewhere for future use for such time as they might be driven out of that country by stockmen.

Fifth. To move them now I think they would have to be given to understand that they must go, although no demonstrative force might be needed.

Sixth. The land on lower White River of course is yet untried, but from the appearance could be made very productive and would make good homes. Possibly a few locations on Bitter Creek and Willow Creek that in connection with stock raising would make the owners a good living, but I think they are few.

Seventh. My opinion is based on having seen most of the agricultural land, and from hearsay and talk with others I will say that I feel unable to discuss an important subject as this and do it justice, but have given my ideas in brief to the best of my judgment.

Respectfully,

WALLACE STARK.

Capt. W. A. MERCER, U. S. Army,
*Acting Indian Agent, Whiterocks, Utah.*

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UINTA AND OURAY AGENCY,
*Whiterocks, Utah, August 31, 1903.*

SIR: In reply to Commissioner's letter, dated July 28, 1903, in which he asks for report on the condition of allotments made to Indians on the former Uncompahgre Reservation, I have the honor to make the following report:



It has been my privilege to see about three-fourths of the land that is reported to have been allotted to Indians, including that on Bitter Creek, which is on the line between Utah and Colorado. Starting from the mouth of White River, there is a strip of land 12 miles long by an average width of 2 miles which can be used for agricultural purposes if a ditch is put in on each side of the river. From reports of the allotting commissioners' all of the frontage on this river has been taken by the Indians. At the head of this strip of land a dam has been put in by a company of white men who intend to utilize strips of land back of the allotments made to Indians. These white men seemed to think that all of this land can be used for farming if properly made ditches are put in. In my opinion this land can not be used by an Indian for the reason that the formation of this ground is of sandy dirt 6 to 10 feet in depth, and will easily wash away unless ditches are properly handled by an experienced man.

The Willow Creek district I have never seen, but from what the Indians say there is a little spring there that furnishes water for about 5 acres of land. There are a number of Indians that live here in winter, but they move away from it in summer for the mountains, where they pick up a summer's living from the ranchmen.

From the 12-mile point up the White River I have seen a number of camps where an allotment or two are made in each pocket of the river, but from the books of these places there could not be more than 40 or 60 acres in them, as the river here is a canyon, the bluffs running from 100 to 300 feet straight up from the river. There are patches here and there that can be used for summer pasturing. The Indians who live in these little pockets of the river also move up into mountains in the summer and live on ranchmen. If any move is made to get them on the Uinta Reservation they will seriously object, as they are well satisfied with their surrounding for the pres-

ent, but for their future good land should be allotted to them elsewhere, even if they do not move to it at the time of allotment.

Up on the Bitter Creek, or rather at the head of it, there is a camp of Indians. There is plenty of good pasturing for a ranch and good for small gardens, but it is my opinion that ranching by an Indian in this locality could not last long, as white men are establishing ranches in the immediate vicinity, who will soon take advantage of the Indian and steal away all he has got. The Indian will then be glad to move away from there. These Indians should be allotted land on the Unita Reservation whether they move now or not, as they will benefit by it in the long run.

Take it all, the former Uncompahgre Reservation is not a place where the Indians should be allowed to stay. It would be a kindly act on the part of the Government to move these Indians to the Uinta Reservation.

Very respectfully,

J. A. ROBB,
*Assistant Clerk.*

W. A. MERCER,
*Captain, Seventh Cavalry,*
*Acting United States Indian Agent,*
*Uintah and Ouray Agency, Utah.*



**S. 6867, 58th Cong., 3d Sess. (1905) (LD 97)**

## A BILL

To provide the manner of opening for settlement and entry and for disposing of certain lands in the Uintah Reservation in Utah.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish war or Philippine insurrections, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *And provided further,* That all lands opened to settlement and entry under this Act remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of for cash, under the rules and regulations to

be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the Act of Congress of May twenty-seventh, nineteen hundred and two, and the Acts amendatory thereof and supplemental thereto.



**S. Doc. No. 159, 58th Cong., 3d Sess. (1905) (LD 101)**

SENATE

58th Congress, 3d Session Document No. 159.

# OPENING OF THE UINTAH INDIAN RESERVATION IN UTAH

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LETTER

from

THE SECRETARY OF THE INTERIOR,

Transmitting

A COPY OF A REPORT FROM THE COMMISSIONER OF INDIAN AFFAIRS CONTAINING A HISTORY OF THE ACTION TAKEN BY HIS OFFICE TO COMPLY WITH THE PROVISIONS OF THE ACT OF MAY 27, 1902, FOR THE OPENING OF THE UINTAH INDIAN RESERVATION IN UTAH.

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FEBRUARY 15, 1905.—Referred to the Committee on Indian Affairs and ordered to be printed.

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DEPARTMENT OF THE INTERIOR,
*Washington, February 15, 1905.*

SIR: I have the honor to acknowledge the receipt of a resolution of the Senate dated February 4, 1905, in the following words:

> *Resolved,* That the Secretary of the Interior be, and he is hereby, directed to report to the Senate, without delay, what steps have been taken to comply

with the provisions of the act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, approved May twenty-seventh, nineteen hundred and two, which provides for the opening of the Uintah Reservation; and that he further furnish the Senate with all the causes which operated to stay the opening of said reservation, together with a copy of such order or orders made by him or by his direction, to carry out the said act of Congress in relation to the said reservation.

In response I transmit herewith a copy of a report from the Commissioner of Indian Affairs, dated the 11th instant, which contains a history of the action taken by his Office, under Department directions, to comply with the provisions of the act of May 27, 1902, for the opening of the Uintah Indian Reservation, in Utah; also a statement of the causes which operated to stay the opening of said reservation.

Accompanying this report are copies of all correspondence of record in the Department up to date on the subject.

Special attention is invited to the letter from the Commissioner of the General Land Office, dated February 6, 1905, reporting as to the time necessary to complete the allotments required by the act of May 27, 1902.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

The PRESIDENT PRO TEMPORE
OF THE UNITED STATES SENATE.

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, February 11, 1905.*

SIR: I have the honor to acknowledge the receipt, by Department reference of February 4, 1905, of Senate resolution of February 4, 1905, for consideration and report. The resolution reads:

> *Resolved,* That the Secretary of the Interior be, and he is hereby, directed to report to the Senate, without delay, what steps have been taken to comply with the provisions of the Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, approved May twenty-seventh, nineteen hundred and two, which provides for the opening of the Uintah Reservation; and that he further furnish the Senate with all the causes which operated to stay the opening of said reservation, together with a copy of such order or orders made by him or by his direction to carry out the said act of Congress in relation to said reservation.

The act of May 27, 1902 (32 Stat. L. 263), provides that the Secretary of the Interior, with the consent thereto of a majority of the adult male Indians of the Uintah and White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family 80 acres of agricultural lands, which can be irrigated * * * said allotments to be made prior to October 1, 1903, on which date all the unalotted land within said reservation shall be restored to the public domain. No appropriation was provided in this act for the purpose of carrying it out.

Under date of May 28, 1902, the Department directed this Office to prepare an estimate, without delay, of the cost of making allotments on the Uintah Reservation,

and stated that the Commissioner of the General Land Office had been called on to furnish an estimate for the surveys. (Copy in duplicate herewith.) Under date of May 28, 1902, this Office made a report, estimating that the cost of making allotments on the Uintah Reservation would amount to $12,000.

It should be borne in mind that at the time of the passage of the act of May 27, 1902, the Indians on the Uintah Reservation were not allotted, and only a portion of the land was surveyed.

The act of July 1, 1902 (32 Stat. L., 575), making appropriations to supply deficiencies, etc., for the fiscal year 1902, directed the Secretary of the Interior to cause careful estimates to be made and submitted to Congress at the beginning of its next session, for the survey of certain Indian reservations, including the Uintah.

The act of March 3, 1903 (32 Stat. L., 997), appropriated $175,000 to do the necessary surveying and otherwise carry out the purposes of so much of the act of May 27, 1902, as provides for the allotment of Indians on the Walker River Reservation, in Nevada, and the Uintah and White River Utes, in Utah, and also the Indians of the Spokane Reservation. This act also directed that the Secretary send an inspector and obtain the consent of the Uintahs to an allotment, as directed by the act of May 27, 1902, and, failing to obtain such consent, to cause said Indians to be allotted without their consent. It extended the time for opening the unallotted lands to public entry to October 1, 1904. On April 27, 1903, this Office, in compliance with an informal request, made a report to the Secretary of the Interior (copy herewith) submitting instructions for the guidance of Inspector James McLaughlin in the negotiations he was to make under the provisions of the last-mentioned act.

Under date of July 8, 1903, the Department referred to this Office for early report a communication from the



Acting Commissioner of the General Land Office, dated July 6, 1903, submitting bids for the survey and subdivision of the Uintah Reservation in Utah. Twenty-nine bids were received. Eighteen bidders were recommended by the surveyor-general for contracts. The estimate of the total cost of the work was $94,256. Under date of July 9, 1903, this Office made a report (copy herewith) on the foregoing.

Under date of July 18, 1903, this Office considered the report made by Inspector McLaughlin, and stated the conclusions reached. Copy of this report is inclosed, as is also a copy of Inspector McLaughlin's report. An examination of these papers shows that the consent of the Indians could not be obtained to an allotment. Some suggestions were made by Inspector McLaughlin looking to the protection of the Indians. Under date of August 25, 1903, the Department directed this Office to prepare the necessary correspondence and a draft of the proper legislation to accomplish the objects specified in Inspector McLaughlin's report. Copy of this communication is inclosed. November 23, 1903, the Office reported thereon and submitted an item for inspection in the Indian appropriation bill for the fiscal year 1904. Its object was to set aside certain lands for a timber reserve, to protect sawmill sites, and obtain for the Indians a proper reservation for the purpose of procuring coal. Copies of these papers are inclosed.

August 10, 1903, this Office transmitted to the United States Surveyor-General, Salt Lake City, 26 letters addressed to the Indian agent granting permission for the persons named to enter the Uintah Indian Reservation for the purpose of executing the contracts awarded them for surveys within said reservation, as authorized by the act of March 3, 1903.

January 23, 1904, this Office made a report to the Department (copy herewith) calling attention to the law as it then stood relative to the Uintah Reservation, and

stated that it would seem to be necessary to make allotments to the Indians thereon before October 1, 1904. The act of April 21, 1904, extended the time for the opening of these lands to March 10, 1905, and appropriated $5,000 to enable the Secretary of the Interior to do the necesasry surveying and otherwise carry out the purpose of so much of the act of May 27, 1902, as provided for the allotment of the Indians on the Uintah Reservation and the White River Utes in Utah.

On April 30, 1904, this office recommended that the acting Indian agent be authorized to commence making the allotments, and that such work be completed at the earliest practicable date. Under date of July 1, 1904, the Department authorized the then agent, Capt. William A. Mercer, to proceed with the work of allotting the Uncompahgres who were entitled to allotment on the Uintah Reservation. Authority was granted by the Department November 16, 1904, based upon a report from Capt. C. G. Hall, acting Indian agent, and a recommendation from this office, for him to begin the work of allotting lands to the Indians of the Uintah Reservation, and to employ certain assistants, but this office was directed to inform him that none of these assistants would be employed and no work of allotting done until this office should be advised of the acceptance of the surveys by the Commissioner of the General Land Office.

Under date of January 31, 1905, the Commissioner of the General Land Office advised this office that the township subdivisonal surveys in the Uintah Reservation, which were made necessary by the act of Congress providing for the opening of the reservation for entry, had been completed in the field, and the allotments to the Indians could be undertaken whenever practicable for this office to proceed with the same. He stated that certain corrections of lines and corners on the ground might yet be required of a deputy surveyor to comply with the Manual of Surveys, but it was assumed that the allot-



ments could be effected, without waiting for these corrections, from the triplicate plats of these surveys which had been forwarded by the surveyor-general of Utah. In reply the Commissioner of the General Land Office was informed, under date of February 3, 1905, that it would be practicable to proceed with the allotments as soon as the returns of surveys are received in this office. If it were not practical to furnish the office with the triplicate plats, owing to the corrections that were required, it was requested that photographic copies of said plats, with the triplicate field notes, be provided. The field notes and triplicate copies of the plats required have not made on March 3, 1903.

The foregoing contains all the information in the possession of this office regarding the steps taken to comply with the provisions of the act of May 27, 1902. As to the causes which operated to stay the opening of the reservation, it will be seen that the said act contained no appropriation for making the surveys or allotments; that thirty-four days later Congress (July 1, 1902) directed the Secretary of the Interior to cause estimates of the cost of surveys to be submitted at the beginning of its next session, and that the necessary appropriation was yet been received.

Since that appropriation was made there appears to have been no unnecesasry delay in executing the surveys and preparing for the work of making the allotments.

The resolution of the Senate is returned, and a copy of this report inclosed.

Very respectfully,

F. E. LEUPP,
*Commissioner.*

The SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
*Washington, May 28, 1902.*

SIR: As the Indian appropriation act for the fiscal year provides for the opening of the Uintah and Walker River reservations after allotment to the Indians, and for mineral entries on the unalloted lands of the Spokane Reservation, in Washington, I have to request that you furnish me without delay an estimate of the cost of making allotments on these reservations.

The Commisisoner of the General Land Office has this day been requested to furnish an estimate for the surveys.

Very respectfully,

THOS. RYAN,
*Acting Secretary.*

The COMMISSIONER OF INDIAN AFFAIRS.

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DEPARTMENT OF THE INTERIOR,
*Washington, May 28, 1902*

SIR: The Indian appropriation act for the fiscal year ending June 30, 1903, provides for the allotment of lands on the Uintah Reservation, in Utah, and on the Walker River Reservation, in Nevada. It also provides for mineral entries on the Spokane Reservation, in Washington, on lands not allotted to Indians.

I will thank you to furnish me without delay an estimate of the cost of surveying these reservations for allotment.

Very respectfully,

THOS. RYAN,
*Acting Secretary.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, May 28, 1902.*

SIR: This Office is in receipt of your communication dated May 28, 1902, in which you request to be furnished, without delay, an estimate of the cost of making allotments on the Uintah, Walker River, and Spokane reservations.

In reply I have the honor to state that the cost of making the allotments on said reservations is estimated as follows: Walker River, $4,000; Uintah, $12,000; Spokane, $2,000.

Very respectfully, your obedient servant,

A. C. TONNER,
*Acting Commissioner.*

The SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,
*Washington, June 6, 1902.*

SIR: I have the honor to invite your attention to the following provisions contained in the Indian appropriation act approved May 27, 1902 (Public, No. 125):

"For survey and allotment of—Walker River Reservation, Nevada.

"For survey and allotment of—Uintah Reservation, Utah.

"For survey and allotment of—Spokane Reservation, Wash."

I have caused estimates to be prepared by the Commissioner of the General Land Office of the cost of sur-

veying these reservations, and by the Commissioner of Indian Affairs of the cost of allotting the same, and I have the honor to request that an item be inserted in the general deficiency or some appropriate bill, appropriating funds necessary to carry out the requirements of the aforesaid act, as follows:

For surveys:

| | | |
|---|---|---|
| Walker River Reservation | $17,500 | |
| Uintah Reservation | 128,000 | |
| Spokane Reservation | 11,500 | |
| | | $157,000 |

For allotments:

| | | |
|---|---|---|
| Walker River Reservation | 4,000 | |
| Uintah Reservation | 12,000 | |
| Spokane Reservation | 2,000 | |
| | | 18,000 |
| Total | | 175,000 |

Copies of the estimates referred to are transmitted for your information.

Without funds the Department will be powerless to carry into effect the provisions of the act in question relating to the aforesaid reservations.

Very respectfully,

THOS. RYAN,
*Acting Secretary.*

The CHAIRMAN OF THE COMMITTEE ON INDIAN AFFAIRS,

*United States Senate.*

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DEPARTMENT OF THE INTERIOR,
*Washington, July 18, 1902.*

SIR: Your attention is invited to a provision contained in the deficiency act (Public, No. 217), approved July 1, 1902, viz: "The Secretary of the Interior is hereby authorized and directed to cause careful estimates to be made and submitted to Congress at the beginning of its next session for survey of the Walker River Reservation in Nevada, the Uintah Reservation in Utah, and the Spokane Reservation in Washington," with request that instructions be given the proper officers of your Office to prepare the required estimates, so that the same may be furnished to Congress at the beginning of its next session.

Very respectfully,

THOS. RYAN,
*Acting Secretary.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., September 15, 1902.*

SIR: Referring to departmental letter of July 18, 1902, inviting the attention of this Office to a provision contained in the deficiency act (Public, No. 217), approved July 1, 1902, authorizing the Secretary of the Interior to cause careful estimates to be made and submitted to Congress of the cost of surveying the "Walker River Reservation" in Nevada; the "Uintah Reservation" in Utah, and the "Spokane Reservation" in Washington, and requesting this Office to instruct the proper surveyors-general to prepare the required estimates, to the end that the same may be duly submitted at the ensuing

session of Congress, I have the honor to report that by office letters "E" of July 26, 1902, the United States surveyors-general of Nevada, Utah, and Washington were requested to furnish the desired estimates in compliance with departmental directions.

With his letter of August 7, 1902, the United States surveyor-general for Nevada submitted his estimate of the cost of surveying and subdividing the Walker River Indian Reservation, aggregating $7,791.26 for field work, and $3,327.50 for examination in the field and office work, making a total of $11,118.75.

Under date of August 6, 1902, the United States surveyor-general for Washington submitted his estimate of the cost of surveying and subdividing the Spokane Indian Reservation, in which the cost of the field work is given at $13,320, and the examination of the work and office work at $3,680, making a total cost of $17,000.

No estimate has as yet been received from the United States surveyor-general for Utah of the cost of surveying and subdividing the Uintah Indian Reservation.

Inclosed herewith are copies of the estimates as submitted by the United States surveyors-general for Nevada and Washington.

Accompanying the estimate of the United States surveyor-general for Nevada is a blueprint diagram showing the extent of the Walker River Indian Reservation and the lines necessary to be run to complete the survey of the area into townships and the subdivision of the townships into sections.

It is requested that said diagram may be returned to this office when the information embraced therein shall have been utilized.



The United States surveyor-general for Utah has again been requested to furnish the estimate relating to the Uintah Indian Reservation.

Very respectfully,

W. A. RICHARDS,
*Acting Commissioner.*

The SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., September 26, 1902.*

SIR: Referring to departmental letter of July 18, 1902, requesting this office to secure from the proper officers estimates of the cost of surveying and subdividing the Uintah Indian Reservation in Utah, the Walker Indian Reservation in Nevada, and the Spokane Indian Reservation in Washington; also to office letter "E" of September 15, 1902, submitting the desired estimates relating to the Walker River and Spokane Indian Reservation in Nevada and Washington, I have the honor to submit herewith a copy of the letter dated September 18, 1902, of the United States surveyor-general for the State of Utah, embodying his estimate of the cost of surveying and subdividing the Uintah Indian Reservation in Utah.

The surveyor-general's estimates are as follows: Cost of field work, $87,420; cost of resurveys, $6,836; cost of office work, $9,500; cost of field examination, $5,000; total estimated cost of the work, $108,756.

The surveyor-general also submits a sketch plat of the Uintah Indian Reservation showing in distinct colors the township lines to be surveyed, the lines of the public surveys heretofore established, and the lines of surveys be-

lieved necessary to be reestablished. Said diagram is herewith inclosed for the information of the Department.

Very respectfully,

BINGER HERMANN,
*Commissioner.*

The SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,
*Washington, December 4, 1902.*

SIR: In compliance with a provision contained in the deficiency act approved July 1, 1902 (Public, No. 217), I have caused careful estimates to be made for the survey of the Walker River Reservation, in Nevada, the Uintah Reservation, in Utah, and the Spokane Reservation, in Washington, and the same are herewith transmitted, together with copies of reports of the Commissioner of the General Land Office of September 15 and 26, 1902.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

The PRESIDENT PRO TEMPORE OF THE UNITED STATES SENATE.

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DEPARTMENT OF THE INTERIOR,
*Washington, April 13, 1903.*

SIR: In accordance with your recommendation of the 10th instant, authority is hereby granted for the publication of an advertisement inviting proposals for executing the survey of the exterior boundaries and subdivisions of the Uintah Indian Reservation, Utah, as follows:

Salt Lake Tribune, 6 times, every alternate day, prior to the date fixed for opening the bids.



Wyoming Press, Evanston, Wyo., 2 times, prior to the date fixed for opening the bids.

Vernal Express, Vernal, Utah, 2 times, prior to the date fixed for opening the bids.

The inclosures to your letter are herewith returned.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, April 27, 1903.*

SIR: In compliance with your informal request I have the honor to submit herewith letter of instructions to Inspector James McLaughlin to negotiate with the Uintah and White River Utes with a view to obtaining their consent to the allotment of their lands as provided in the act of March 3, 1903 (Public, No. 144), and previous legislation therein referred to.

Very respectfully,

A. C. TONNER,
*Acting Commissioner.*

THE SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, April 27, 1903.*

SIR: A paragraph in the Indian appropriation act approved March 3, 1903 (Public, No. 144), provides as follows:

"That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act: *And provided further,* that the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not exceed two hundred and fifty thousand acres: *And provided further,* That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May twenty-seventh, nineteen hundred and two, be, and the same is hereby, extended to October first, nineteen hundred and four."

The act of May 27, 1902, to which reference is made in the act of March 3, 1903, above quoted, provides as follows:

"That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated, and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided,* That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre; * * *



and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribe shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

"Said item of seventy-four thousand and sixty-four dollars and forty-eight cents, to be paid to the Uintah and White River Utes, covers claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians, and for which the Government has received from said Uncompahgre Indians money aggregating sixty thousand and sixty-four dollars and forty-eight cents; and the remaining ten thousand dollars claimed by the Indians under an act of Congress detaching a small part of the reservation on the east and under which act the proceeds of the sale of the lands were to be applied for the benefit of the Indians."

Public resolution No. 31, contained the following provisions:

"In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of nonirragable grazing lands therein at one or more

places as will subserve the reasonable requirements of said Indians for the grazing of livestock.

"All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural lands which can be irrigated, and shall be on the basis of eighty acres to each head of a family, and forty acres to each other Indian and no more. The grazing land to be selected and set apart as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named."

From the foregoing you will see that the Uintahs, White River Utes, and Uncompahgre not heretofore allotted are to be allotted 80 acres to each head of a family, and 40 acres to each other person, of irrigable land; that if the Uintah and White River Utes do not consent to the allotments by the first of June next the allotments are to be made notwithstanding, and the unallotted lands, except not exceeding 250,000 acres of grazing land south of the Strawberry River, are to be opened to entry on the first of October, 1904.

Also that the payment of $70,064.48 to the Uintah and White River Utes is conditioned upon the consent of these Indians to the allotment of their lands and the restoration to the public domain of the unalloted lands (except those reserved for grazing).

Upon receipt thereof you are instructed to proceed to the Uintah, etc., Agency and Reservation, call a council of the Uintah and White River Utes, or a separate council of each tribe if you find that course more expedient, lay before them the provisions of the law as hereinbefore recited, and endeavor to obtain their consent to the allotment of lands as provided in the law, and to the restoration of the surplus lands.



Their consent should be expressed in writing and signed by as many of the male adults as are willing to give their consent, the signatures of a majority being necessary to make the consent effective.

The signatures should be attested in the usual manner.

Very respectfully,

A. C. TONNER,
*Acting Commissioner.*

JAMES MCLAUGHLIN, Esq.,
*United States Indian Inspector.*

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DEPARTMENT OF THE INTERIOR,
*Washington, April 29, 1903.*

SIR: I have approved and return herewith the draft of instructions prepared in your office for the guidance of United States Indian Inspector James McLaughlin in negotiating with the Uintah and White River Utes in Utah, with a view to obtaining their consent to the allotment of their lands as provided in the act of March 3, 1903 (Public, No. 144), and previous legislation therein referred to, which accompanied your letter of the 27th instant.

You will advise the inspector that he should make full stenographic report of the councils, and that he is authorized to employ a stenographer and typewriter for this purpose and in the preparation of his final report.

These instructions should be forwarded to Mr. McLaughlin at the Uintah, etc., Agency, Utah.

Very respectfully,

THOS. RYAN,
*Acting Secretary.*

The COMMISSIONER OF INDIAN AFFAIRS.

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, July 9, 1903.*

SIR: This office is in receipt by Department reference for early report of a communication from the Acting Commissioner of the General Land Office, dated July 6, 1903, in which he submits bids for the survey and subdivison of the Uintah Indian Reservation in Utah, concurs in the recommendation of the surveyor-general, and requests authority to allow rates of mileage named in the recommended awards.

The Acting Commissioner states that the surveyor-general reports that 29 bids were received.

Eighteen bidders, being the lowest bidders and believed by the surveyor-general to be competent and reliable, are recommended by him to whom contracts should be awarded.

The total cost of the work under the 18 bids is estimated at $94,256.

The Acting Commissioner requests authority to instruct the surveyor-general to award the contracts as recommended and to allow the several deputies the rates of mileage stipulated in their respective bids, all of said rates being subject to statutory restrictions.

This office sees no objection to granting the request of the Acting Commissioner of the General Land Office.

The inclosures to the Acting Commissioner's letter did not accompany your reference.

Very respectfully,

W. A. JONES,
*Commissioner.*

The SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, July 18, 1903.*

SIR: The Office is in receipt, by Department reference, for consideration and report, of a communication from Indian Inspector James McLaughlin dated May 30, 1903, reporting the result of his negotiations with the Uintah and White River Utes of the Uintah Reservation, Utah, relative to the opening of their reservation.

The inspector reports that of the 159 Uintah and 121 White River male adults belonging to the Uintah Reservation, a total of 280 male adults, only 75 of the Uintahs and 7 of the White Rivers, a total of 82 male adults, could be induced to sign the paper prepared by him, giving their assent to the provisions of the acts opening their unallotted lands to settlement.

He states that while the signatures of a majority of the male adults of the reservation were not obtained, he feels that he accomplished all that could reasonably be expected, considering the attitude of the Indians in reference to the matter when he reached the agency, they being then unanimously opposed to the opening of their reservation under the provisions of the act, but through clear explanations of the law and painstaking arguments he succeeded in bringing them to understand that the reservation is going to be opened as provided in the act; that its survey will soon be commenced and when completed allotments will be made to them, after which the residue will be opened to settlement, except the tract of 250,000 acres situated south of Strawberry River, which is to be reserved for their common use for grazing purposes.

He states that they held out strenuously against accepting this statement as a fact, but were finally brought to understand it fully and clearly, and now accept it, at least passively, with as good grace as is reasonable to expect; also that those of the Indians who signed the acceptance did so to show their good will, and many oth-

ers would doubtless have signed had there been anything to be gained by their doing so.

He expresses the opinion, judging from the courteous manner in which the Indians treated him and the confidence they have in Captain Mercer, that they will all acquiesce gracefully and meet the wishes of the Department in the premises.

He suggests, and strongly recommends, that a timber reserve of at least 1 township (6 miles square) be set apart, from which these Indians may obtain building material, the tract suggested to embrace the agency sawmill, a township of the dwarf cedar tract, near the agency, to supply them with fence posts and wood fuel, and a tract of 160 acres of land embracing a certain vein of coal situated in Farm Creek, about 8 miles north by northwest of Uintah Agency headquarters at White Rock, for use of the Indians to provide them with fuel.

Regarding the necessities of this reservation, he states that the agency sawmill, including planer, shingle, and lathe machinery, is practically new, in first-class condition, and of great benefit to the reservation at the present time in providing necessary building material, which is very much needed by both agency and Indians; that the Indians are to be allotted irrigable lands only, which lands contain little or no timber; that the bench lands, nearly all of which can be irrigated, are the most desirable lands for farming purposes on the reservation, but are entirely devoid of timber, and it is therefore necessary that the Indian allottees have a timber reserve from which they can obtain building material, fence posts, and fuel, this timber reserve to be held in common, or equally apportioned among the allottees; that there is an abundant supply of good pine and cedar timber in the mountains adjacent to the Uintah Agency, from which the Indians now obtain their building material and fuel, but under the provisions of the act opening the reservation they will be deprived of all timber except what may be found



to be within the tract of land to be reserved for grazing purposes south of the Strawberry River, which he states, from personal knowledge, contains very little timber, except in the extreme southeast corner, 70 miles from where the principal settlements of the Indians are now located, and where the greater portion of the allotments will doubtless be made, and that the contract price of wood at the military post of Fort Dushane, 14 miles from the Uintah Agency, being $8.50 per cord, and native coal $6.80 per ton, shows the importance of the Indians being provided with means of obtaining their fuel without being obliged to buy it.

The act of May 27, 1902 (32 Stat. L., 245), provides that all the unallotted lands within the Uintah Reservation shall be restored to the public domain on October 1, 1903. By the act of March 3, 1903 (32 Stat. L., 982), the date of opening is postponed until October 1, 1904. In the opinion of this office the President has ample authority to reserve the three tracts suggested from the lands which will become part of the public domain on that date, and such action will be recommended as soon as the surveys have been extended so that the proposed reserves can be properly described, unless you are of the opinion that the President is not authorized to take such action. Should you be of such opinion, it is recommended that Congress be asked to enact the necessary leigslation to authorize it, but, as above indicated, I do not think this will be necessary.

The matter of making allotments to these Indians will be considered in a separate report.

Very respectfully,

W. A. JONES,
*Commissioner.*

The SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., August 4, 1903.*

SIR: Inclosed herewith is a copy of a letter dated Salt Lake City, Utah, July 28, 1903, signed by the United States surveyor-general, requesting that permission be obtained from your office to allow the designated United States deputy surveyors to enter the Uintah Indian Reservation for the purpose of executing awarded contracts for surveys within said reservation, as authorized under the act of Congress approved March 3, 1903.

The surveyor-general requests that the permits be sent to his office, to be handed to the designated deputies.

Concurring in the request of the United States surveyor-general for Utah, I have to suggest that the desired permits be sent by your office direct to that officer, and this office advised to that effect.

J. H. FIMPLE,
*Acting Commissioner.*

The COMMISSIONER OF INDIAN AFFAIRS,
*Washington, D. C.*

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DEPARTMENT OF THE INTERIOR,
OFFICE OF U.S. SURVEYOR-GENERAL,
DISTRICT OF UTAH,
*Salt Lake City, Utah, July 28, 1903.*

SIR: I have the honor to request that permission to enter the Uintah Indian Reservation to make surveys be obtained from the Indian Department for each of the the following United States deputy surveyors, who have entered into contract to do surveying on the Uintah Indian Reservation, under act of Congress, approved March 3, 1903: James M. Lents, Hubert D. Page, Byron S. Kershaw, George C. Swan, William S. Musser, John R. Stewart, Andrew J. Stewart, jr., Scott P. Stewart, Alfred



L. Booth, Clarence S. Jarvis, James H. Martineau, Harvey D. Heist, William Dallas, Herman E. Freudenthal, James C. Dick, Austin K. Tiernan, James F. Trotter, Francis M. Lyman, jr., H. B. Maxson, Fred Johnson, John W. McKim, R. E. L. Collier, Harry Rager, Arthur H. Brown, Fred M. Brown.

Please send the permits to this office, that I may hand them to the deputies.

Very respectfully,

EDWARD H. ANDERSON,
*United States Surveyor-General for Utah.*

The COMMISSIONER OF THE GENERAL LAND OFFICE,
*Washington, D. C.*

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, August 10, 1903.*

SIR: In compliance with your request of July 28, 1903, received through the Commissioner of the General Land Office, I transmit herewith 26 letters addressed to Capt. W. A. Mercer, United States Indian agent, granting permission for the persons mentioned in your said letter to enter the Uintah Indian Reservation for the purpose of executing the contracts awarded them for surveys within said reservation, as authorized by the act of March 3, 1903.

Very respectfully,

A. C. TONNER,
*Acting Commissioner.*

The UNITED STATES SURVEYOR-GENERAL,
*Salt Lake City, Utah.*

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, November 23, 1903.*

SIR: Under date of August 25, 1903, your returned to this Office the report of Inspector James McLaughlin of his negotiations with the Uintah and White River Utes of Utah, relative to the opening of the Uintah Reservation as provided by the acts of May 27, 1902 (32 Stat. L., 245), and March 3, 1903 (32 Stat. L., 982), and directed the preparation of the necessary correspondence relative to the setting apart of one township as a timber reserve to embrace the agency sawmill, one township of the dwarf-cedar tract to supply the Indians with fence posts and wood fuel, and 160 acres located on Farm Creek as a coal reserve.

Under date of September 9, 1903, Acting Agent Mercer made report upon a communication from Hon. George Sutherland, of Salt Lake City, in regard to the character of the land allotted the Uncompahgres on the former Uncompahgre Reservation. Captain Mercer expressed the opinion that these Indians should be given allotments on the Uintah Reservation, and stated that there is land enough to allot them in addition to the Uintah and White Rivers.

There were 83 Indians allotted on the Uncompaghre Reservation, and to allot these 83 on the Uintah Reservation would require not to exceed 5,000 acres.

Congress can undoubtedly authorize you to cancel these allotments, patents not having issued, and I am of the opinion that this authority should be granted.

I have accordingly prepared the draft of an item authorizing the setting apart of the three reserves mentioned, and containing a proviso authorizing the Secretary of the Interior, in his discretion, to cancel any allotment made in the former Uncompahgre Reservation, and to allot to the Indian whose allotment may be canceled lands in the



Uintah Reservation in quantity as provided in public resolution No. 31, approved June 19, 1902 (80 acres to head of family and 40 acres to each other person), and have the honor to recommend that the same be transmitted to the Senate Committee on Appropriations and the House Committee on Indian Affairs, with the request that it be inserted in the Indian appropriation bill.

I also transmit duplicate copies of Inspector McLaughlin's report; office report of July 18, 1903; your letter of August 25, 1903; Mr. Sutherland's letter of June 13, 1903, and Captain Mercer's report of September 9, 1903, and inclosures.

Very respectfully,

W. A. JONES,
*Commissioner.*

The SECRETARY OF THE INTERIOR.

*Paragraph for insertion in Indian appropriation bill*

That in addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in Utah and to the grazing lands to be selected and set apart for the use in common of said Indians and of the Uncompahgre Indians, the Secretary of the Interior shall, before any of the lands of said reservation are opened to disposition under any public law, select and set apart for the use in common of the Indians of that reservation, including all Uncompahgre Indians receiving allotments in said reservation of the reduced area provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, one tract not exceeding one township in extent as a timber reserve, said trace to embrace the agency sawmill, one tract not exceeding one township in extent, containing dwarf cedar for fuel and fence posts, and a tract of one hundred and sixty acres, embracing a vein of coal, situated in Farm Creek: *Provided,* That the Secretary of the Interior may, in his discretion, cancel the allotment made to any Un-

compahgre Indian within the former Uncompahgre Reservation and for which a trust or other patent has not issued, and in lieu thereof allot such Uncompahgre Indian in the Uintah Reservation in quantity as provided in said public resolution numbered thirty-one.

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DEPARTMENT OF THE INTERIOR,
*Washington, November 30, 1903.*

SIR: I have the honor to transmit herewith copy of a report of the 23d instant from the Commissioner of Indian Affairs and accompanying paragraph for insertion in the bill making appropriations for the Indian Service for the fiscal year ending June 30, 1905, together with copies of correspondence in relation thereto.

This paragraph relates to the Uintah Reservation in Utah, and provides that before any of the lands are open to disposition under any public-land law that the Secretary of the Interior shall select and set apart for the use in common of the Indians of that reservation, including all Uncompahgre Indians receiving allotments in said reservation of the quantity of lands as provided by public resolution No. 31 of June 19, 1902, 1 tract not exceeding 1 township in extent as a timber reserve, said tract to embrace the agency sawmill; 1 tract, not exeeding 1 township in extent, containing dwarf cedar for fuel and fence posts, and a tract of 160 acres embracing a vein of coal situated on Farm Creek; and it further provides that the Secretary, in his discretion, cancel the allotment made to any Uncompahgre Indian within the former Uncompahgre Reservation for which a trust or other patent has not issued, and in lieu thereof allot such Uncompahgre Indians in the Uintah Reservation in quantity as provided in said public resolution No. 31.

This matter has been considered by the Department, and I have the honor to recommend that it receive favorable action by the Congress.



Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

THE PRESIDENT PRO TEMPORE OF THE UNITED STATES SENATE.

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, January 23, 1904.*

SIR: The act of March 3, 1903 (32 Stat. L., 982), provides that the Secretary of the Interior shall cause to be allotted to each of the Uintah and White River Indians the quantity and character of the land mentioned and described in the act of May 27, 1903 (32 Stat. L., 245), and it also extended the time of opening the unallotted lands to public entry until October 1, 1904.

Under existing laws, all unallotted lands of the Uintah reservation, except those reserved for grazing purposes, are to be opened for public entry on October 1 next. It would therefore seem to be necessary to make allotments to said Indians before the time mentioned.

Your attention is invited to this matter that you may give such directions as you may deem proper.

Very respectfully,

W. A. JONES,
*Commissioner.*

THE SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,
*Washington, February 3, 1904.*

SIR: The Department desires to be advised as to the present status of the work of surveying the lands of the Uintah Reservation, Utah, and the probable time necessary to complete the same.

The provisions of the acts of May 27, 1902, and March 3, 1903, contemplated the opening to public entry of the unallotted lands in said reservation on October 1, 1904, on the assumption that the lands would be surveyed in time to permit allotments to be made to the Indians prior to that time. The Department desires to bring to the attention of Congress the necessity for the extension of the time for opening said reservation, unless your office is satisfied that surveys will be completed in ample time for allotments to be made before the date fixed by the Act of Congress, October 1, 1904.

Yours very truly,

E. A. HITCHCOCK,
*Secretary.*

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

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DEPARTMENT OF THE INTERIOR,
*Washington, February 6, 1904.*

SIR: Referring to the following provision contained in the Indian appropriation act approved March 3, 1903—

"That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May twenty-seventh, nineteenth hundred and two, be, and the same is hereby extended to October first, nineteen hundred and four"—

I have the honor to transmit herewith a copy of a report of the 4th instant from the Commissioner of the General Land Office stating that it will require the whole of the next surveying season to complete the survey of this reservation.

After the completion of these surveys, some 1,600 allotments are to be made; this will require at least three or four months, or probably longer, as the act of May 27, 1902, provides that the allotments shall be agricultural land which can be irrigated, and if the whole of the next



surveying season is required to complete the survey the allotments can not be made by the 1st of October, 1904. I have, therefore, the honor to request that the date for said opening be extended for one year from October 1, 1904.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

THE CHAIRMAN OF THE COMMITTEE ON INDIAN AFFAIRS,
*United States Senate.*

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, April 30, 1904.*

SIR: Referring to Office letter of January 23, 1904, inviting attention to the requirements of the law in regard to allotments to the Uintah and White River Indians on the Uintah Reservation, you are advised that this Office is in receipt of a communication from Acting Agent Mercer, dated April 20, 1904, in which he states that inasmuch as the date of the opening of the Uintah Reservation appears to be fixed for March 1, 1905, and that it will probably some months before the surveyed plats are ready for use in connection with the proposed allotting of Uintah and White River bands which, by the provisions of the act providing for the opening of the reservation, must precede such opening, if he deems it advisable to invite attention to the condition of the Uncompahgre band of Ute of his agency, and states that if it is the intention to provide allotments for them, it will be necessary to take up that work at once. He states the conditions, asks for information, and offers a suggestion as to the manner of getting that work done before they are obliged to take up the task of alloting the Uintah and White Rivers.

Agent Mercer is slightly in error as to the date fixed for the opening of the surplus lands, as the act of April 21, 1904 (Public, No. 125) extends said time to March 10, 1905. Said act also provides the sum of $5,000 to enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the purpose of so much of the act of May 27, 1902, as provides for the allotment of the Indians of the Uintah and White River Ute in Utah.

Regarding the Uncompahgre, Agent Mercer states that the allotment rolls show that 380 Uncompahgre Indians have been allotted; that 283 allotments were made on the Uintah Reservation; 101 on the Uncompahgre (four of these having been partly allotted on both reservations); that a corrected census of the Uncompahgre, which he is now at work upon and will shortly submit, will show the total number of Uncompahgre to be only about 540; and that all of the Uncompahgre allotted on the Uintah Reservation have good land, that is, land that can be irrigated and will then prove productive; that many of these allottees are now improving their lands and all will soon do so, while of those allotted on the Uncompahgre Reservation but few are engaged in agriculture; that practically all of the lands are useless until irrigated, and no provision has yet been made to that end, while some are utterly worthless, having been allotted on ground that can not be irrigated and so remote from the agency that the allottees are never seen and no help can be given them; and that these few and those who have not been allotted roam at will over a vast extent of "bad land" territory, like the deer or coyote, totally without the reach of civilizing influences.

He further states that the Uncompahgres are away behind the Uintahs and even the White Rivers in the practice of civilized methods, but as a body they are possessed of many good traits of character that in his opinion should be encouraged and utilized to their improvement, and which under equal opportunities will place them in advance of the other Utes.



He refers to joint resolution of June 19, 1902 (32 Stat. L., 742), and asks if it is intended that hereafter all allotments to Uncompahgre Indians shall be made on the Uintah Reservation, and if the Uncompahgres must wait until the Uintahs and White Rivers have selected lands before they can select, or have selected for them, lands for allotment on the Uintah Reservation.

He states that the following things should be done at once for the Uncompahgres:

(*a*) The allotments on the Uncompahgre Reservation should be examined by a competent person, one who is at once a farmer and understands irrigation and has local knowledge of what constitutes good agricultural lands, to the end that all allotments not suitable can be reported for annulment.

(*b*) All Indians who have been allotted on unsuitable lands on the Uncompahgre Reservation should have their allotments canceled and allotted suitable lands on the Uintah Reservation.

(*c*) All who have had no allotments should have lands selected for them on the Uintah Reservation, and allotments made as soon as possible.

(*d*) Surveys and other work necessary to provide irrigation ditches for the allotments that are to be retained on the Uncompahgre Reservation should be made and arranged for at once. This can be easily and cheaply accomplished and is absolutely necessary before the Indians can cultivate the lands.

(*e*) I have had a family register prepared and the rolls carefully corrected and these should be used in connection with allotments to the Uncompahgres, as the old rolls are very defective.

He recommends that the adjustment of the allotments of the Uncompahgres, all new allotments to be made them, and all allotments for the Uintahs and White Rivers be made under the direction and general supervision of the agent, and that he be authorized to personally select and employ at once, to carry out the work for the Uncompahgres as outlined above, a suitable man to be known as the field allotting agent, to take immediate charge of the field work under the direction of the agent, at a salary of $150 per month and not to exceed $2 per day for subsistence; also that the agent be authorized to employ a surveyor at $100 per month and not to exceed $1.50 per day for subsistence, a field cook at $40 per month, and Indian assistants not to exceed three in number, one of whom shall be a teamster and with the others act as general assistants to the surveyor, etc., at $40 per month each, the cook and Indians not to exceed $1 per day each for subsistence.

He believes that all necessary transportation, forage, tentage, camp equipage, and cooking utensils can be supplied by the agency and the necessary clerical work performed by the present irregular labor allowed for family register and allotting work, the position to be continued under the present incumbent until all allotting work is completed. He states that the work should commence for the Uncompahgre at once, and for the Uintah and White Rivers just as soon as the plats or field notes for the irrigable lands can be supplied. He believes that all the surveys have been completed on the lands suitable for allotments, as these lands are the open, practically level, low, or table-lands.

The joint resolution of June 19, 1902, referred to by Agent Mercer provides that "All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Reservation shall be confined to agricultural lands which can be irrigated, and shall be on the basis of eighty acres to each head of a family and forty acres to each other Indian, and no more."



This would seem to contain sufficient authority for making allotments to the Uncompahgres on the Uintah Reservation. Eighty-three allotments on the Uncompahgre Reservation were approved by the Secretary of the Interior under the act of March 1, 1899, (30 Stat. L., 924). If the joint resolution contains sufficient authority it is believed that these eighty-three allottees on the Uncompahgre Reservation should be induced, if possible, to relinquish their allotments there and take allotments on the Uintah Reservation.

As stated by Agent Mercer no irrigation has been provided for these allotments, and this office knows of no law under which irrigation can now be provided for them. Much of the land allotted is known to be incapable of irrigation and therefore practically worthless.

It is believed that the plan suggested by Agent Mercer for the allotment of the lands in the Uintah Reservation is not only the most practicable and economical, but also the only one under which the allotments can be completed before the 10th of March next. There remains only about six months in which allotment work can be prosecuted in the field on the Uintah Reservation, and it is believed that operations should commence at once.

It is accordingly recommended that the agent in charge of the Uintah Reservation in Utah be authorized to employ a field allotting agent at a salary of $150 per month and not exceeding $2 per day for subsistence; a surveyor at $100 per month and not exceeding $1.50 per day for subsistence; a field cook, and not exceeding three Indian assistants, one of whom shall be a teamster, at $40 per month each and not exceeding $1 per day for subsistence; and that he be at once authorized to proceed with the work of allotting the Uncompahgres, Uintahs, and White River Utes, in accordance with the recommendations contained in his said letter of April 20, 1904, which is herewith transmitted, said amounts to be paid from the appropriation of $5,000 made by the act of April 21, 1904.

It is believed that the surveyor can obtain the necessary data from the deputy surveyors who made the survey or from the surveyor-general's office.

Very respectfully,

A. C. TONNER,
*Acting Commissioner.*

THE SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,
*Washington, June 17, 1904.*

SIR: Referring to your office report of the 4th of February last relative to surveys on the Uintah Indian Reservation, in Utah, I have to request that you inform me as early as practicable of the actual present condition of the survey work on the reservation, together with any detailed information as to the progress of the same that may be available.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

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DEPARTMENT OF THE INTERIOR,
*Washington, July 1, 1904.*

SIR: In partial compliance with your recommendations of April 30 last, in the matter of allotments to Indians of the Uintah Reservation, Utah, as required by law, authority is hereby granted the agent in charge of the Uintah Reservation, Utah, to employ a field allotting agent at a salary of $150 per month and not exceeding $2 per day for subsistence; a surveyor at $100 per month and not exceeding $1.50 per day for subsistence; a field cook and not exceeding three Indian assistants, one of whom shall be a teamster at $40 per month each and not



to exceed $1 per day for subsistence; and he is at once authorized to proceed with the work of alloting the Uncompahgre Indians, or such of them as may desire to change their present allotments, under instructions from your office.

Only such of the above-named employees as are required for this service will be employed at this time, and their services should not be continued for a longer time than necessary.

Further instructions will hereafter be given in regard to alloting the Uintahs and White Rivers.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

THE COMMISSIONER OF INDIAN AFFAIRS.

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DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE,
UINTAH AND OURAY AGENCY,
*Whiterocks, Utah, October 17, 1904.*

SIR: I have the honor to recommend that I be authorized to begin the work of allotting lands to the Indians of this (Uintah) reservation. It is desired to do much of this work before the worst of the winter sets in and to be ready with the allotments before the reservation is opened. It is believed that this can be accomplished in time, and to this end I believe that the work of allotting can be done by me personally, without the assistance of an allotting agent. Of course it would be necessary to have a competent surveyor's party in the field, and to this end it is requested that authority be granted to employ for the work one surveyor at $100 per month, with an allowance of $1.50 per day for expenses; one field cook at $40 per month, with an allowance of $1 per day for expenses; three field assistants at $40 per month, with an allowance of $1 per day each for expenses.

The three field assistants to be Indians if such can be obtained; otherwise white men. The surveyor and the cook to be white men.

Very respectfully,

C. G. HALL,
*Captain, Fifth Cavalry, Acting Indian Agent.*

THE COMMISSIONER OF INDIAN AFFAIRS,
*Washington, D.C.*

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, November 7, 1904.*

SIR: Under date of July 1, 1904, you granted authority for the agent in charge of the Uintah Reservation, Utah, to employ certain assistants and to proceed at once with the work of allotting the Uncompahgre Indians, or such of them as might desire, to change their allotments under instructions from this Office. You added that further instructions would thereafter be given in regard to allotting the Uintahs and White Rivers.

This Office is now in receipt of a communication from Capt. C. G. Hall, acting Indian agent, dated October 17, 1904, in which he asks authority to begin the work of allotting lands to the Indians of the Uintah Reservation. He states that it is desired to do as much of the work as possible before the worst of the winter sets in, and to be ready with the allotments before the reservation is opened. He belives that this can be accomplished in time, and to this end believes that the work of alloting can be done by him personally, without the assistance of any alloting agent. He states that it will be necessary to have a competent surveying party in the field, and to this end requests that authority be granted to employ for the work one surveyor, at $100 per month, with an allowance of $1.50 per day for expenses; one field cook, at $40 per month, with an allowance of $1 per day for expenses; and



three field assistants, at $40 per month, with an allowance of $1 per day for expenses, the field assistants to be Indians, if such can be obtained.

In a separate communication of the same date Captain Hall asked that plats of the recent survey of the Uintah Reservation be furnished him to enable the allotting party to begin work at an early date. From informal inquiry at the General Land Office it is learned that none of the recent surveys on the Uintah Reservation have been accepted. It is therefore impossible to comply with this request, and Captain Hall has been so advised.

According to existing law the surplus unallotted lands of the Uintah Reservation are to be restored to the public domain on the 10th of March next, only four months from the present date. If there is to be any attempt to comply with the law it would seem to be necessary to commence the work of allotting the Uintahs and White Rivers at the earliest possible date.

Captain Hall's letter is submitted for such action as the Department will deem proper.

Very respectfully,

A. C. TONNER,
*Acting Commissioner.*

The SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,
*Washington, November 16, 1904.*

SIR: I acknowledge the receipt of your report of 7th instant and accompanying letter from Capt. C. G. Hall, acting Indian agent, Uintah Agency, Utah, in which he asks authority to begin the work of alloting lands to the Indians of the Uintah Reservation, and to that end asks to employ one surveyor at $100 per month, with an allowance of $1.50 per day for expenses, one field cook at $40 per month, with an allowance of $1 per day for expenses,

and three field assistants at $40 per month, with an allowance of $1 per day each for expenses.

Acting Agent Hall's request is granted, but you will inform him that none of these persons will be employed and no work of allotting be done until he is advised by your office of the acceptance of the surveys on the Uintah Reservation by the Commissioner of the General Land Office.

Captain Hall's letter is herewith returned.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

The COMMISSIONER OF INDIAN AFFAIRS.

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DEPARTMENT OF THE INTERIOR,
*Washington, December 10, 1904.*

SIR: I have the honor to transmit herewith, for the information of your committee, a copy of a communication addressed by me to the President, under date of November 25, 1904, giving a brief statement regarding the lands of the Uintah Indian Reservation in Utah, and the present status of the same.

As you will observe, the Department on February 6, 1904, in view of a report from the Commissioner of the General Land Office as to the probable time required to complete the surveys on this reservation, requested Congress to further extend the time for the opening of the same to public settlement for one year from October 1, 1904. The time, however, was extended by the Congress only until March 10, 1905, as per provision in the Indian appropriation act approved April 21, 1904, and $5,000 was appropriated to enable the Secretary of the Interior to have completed the surveying and allotting as required by the act of May 27, 1902.



The field work on these surveys is reported to be complete, but the office work on the field notes, plats, etc., has not been finished, and none of the surveys have yet been accepted by the General Land Office.

Authority was granted on November 16, 1904, for the acting agent of the Uintah Agency to employ a surveyor and necessary assistants, so as to begin the work of allotting the lands to the Indians, in manner as provided in the act of May 27, 1902, as soon as the surveys shall have been accepted by the General Land Office; but it is quite certain that very little of this work can be done in any event during the winter season, and as the said act requires that the allotments shall be made before the lands are thrown open, it is not believed to be possible to comply with such requirement in time to open the unallotted lands to public entry on March 10, 1905.

In view of the foregoing, I have the honor to submit the matter for the further consideration of your committee, with the request that the time for opening these lands be extended to October 1, 1905, the date suggested in Department letter of February 6, 1904, above referred to.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

The CHAIRMAN OF THE COMMITTEE ON INDIAN AFFAIRS,
*House of Representatives.*

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, December 24, 1904.*

SIR: Referring to your communication dated November 13, 1904, in which you advised this office that the

Department requested Congress, under date of the 10th instant, to further extend the time for the opening of the lands of the Uintah Reservation, Utah, to public entry until October 1, 1905, I have the honor to transmit herewith a copy, in duplicate, of a communication from Capt. C. G. Hall, acting agent, dated December 14, 1904, giving reasons why the opening of the reservation should be postponed. The copies are transmitted for such disposition as you may be pleased to make.

Very respectfully,

A. C. TONNER,
*Acting Commissioner.*

The SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,
*Washington, January 4, 1905.*

SIR: Referring to my letter to your committee under date of the 10th ultimo, requesting, for reasons therein stated, that the time for opening the surplus lands of the Uintah Indian Reservation, in Utah, to public entry, be extended to October 1, 1905, I have the honor to transmit herewith, for your consideration in connection therewith, a copy of a communication, dated the 24th ultimo, from the Acting Commissioner of Indian Affairs, forwarding a letter from Capt. C. G. Hall, acting agent of the Uintah and Ouray Agency, Utah, of the 14th ultimo, giving further reasons why the opening of the said reservation should be postponed.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

The CHAIRMAN OF THE COMMITTEE ON INDIAN AFFAIRS,
*United States Senate.*

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DEPARTMENT OF THE INTERIOR,
*Washington, January 4, 1905.*

SIR: I have the honor to invite your attention to the inclosed copy of a letter from the Acting Commissioner of Indian Affairs, dated December 24, 1904, with which is transmitted a report from the acting agent of the Uintah and Ouray Agency, Utah, relative to the grazing lands to be reserved for the Indians of said agency, under the provisions of the act of Congress approved March 3, 1903 (32 Stat. L., 982).

It appears from Captain Hall's letter that the location of the grazing lands as fixed by said act, south of the Strawberry River, will not be for the best interests of the Indians for several reasons:

First. That portion of the reservation is suitable for winter range.

Second. It is remote from the agency, near which a great many of the Indians will of necessity be located, and they will take little or no interest in cattle that are placed 60 or 70 miles from where they live.

Third. Better grazing lands can be had in the section lying from the forks of the Upper Duchesne River along the foothills of the Uintah Range to the section east of the agency known as "Deep Creek," which land, while not very suitable for agricultural purposes, affords excellent grazing.

In view of the facts above stated, I have the honor to submit herewith a draft of an item, prepared in the office of Indian Affairs, for insertion in the Indian appropriation bill, the effect of which will be to modify that provision of the said act of March 3, 1903, which confines the grazing lands to that portion of the reservation south of the Strawberry River, and permit other and better lands to be selected for that purpose.

The matter is submitted for consideration, with request for the favorable action of your committee thereon.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

The CHAIRMAN OF THE COMMITTEE ON INDIAN AFFAIRS,
*United States Senate.*

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DEPARTMENT OF THE INTERIOR,
*Washington, January 20, 1905.*

SIR: I have the honor to acknowledge the receipt of your letter of the 19th instant, in regard to the opening of the lands of the Uintah Reservation and the setting aside of grazing lands therein.

The matter having been referred to the Commissioner of Indian Affairs for consideration, you are advised that the Commissioner is of the opinion that certain changes should be made in the bill so as to provide for the opening of the lands in the discretion of the President, in order that when allotments are completed he can open the lands as soon thereafter as may seem desirable, and to that end the Commissioner proposes the following amendment in line 17, on page 38, of the Indian appropriation bill: After the word "five" to insert "unless the President shall determine that the same may be opened at an earlier date." With this amendment the Commissioner is of the opinion, and so am I, that it will not be at all necessary to amend the bill in the manner suggested by Mr. Howell.

As to the suggestion of Mr. Howell that it should be made clear that the grazing lands are not to exceed 250,000 acres, the Comissioner suggests that I concur, that the bill as it now stands modifies existing legislation only as to the location of the grazing lands, leaving the quantity intact as to the number of acres to be set aside for that purpose.



Referring to the suggestion of Mr. Howell as to the manner of opening these lands to settlement, that is to say, under the general provisions of the homestead, townsite, and mining laws of the United States, I am of the opinion that this would be very detrimental to the interests of the Indians, and recommend that the item in H. R. 17474, as it now stands, be adhered to, beginning with the word "*Provided,*" in line 17, page 38, and I have to request that no change be made therein.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

Hon. JAMES S. SHERMAN,
*Chairman Committee on Indian Affairs,*
*House of Representatives.*

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., January 31, 1905.*

SIR: I have the honor to inform you that the township and subdivisional surveys in the Uintah Indian Reservation, which were made necessary by the act of Congress providing for the opening of the reservation to entry, have been completed in the field, and allotments to the Indians can be undertaken whenever practicable for your office to proceed with the same.

Certain corrections of lines and corners on the ground may yet be required of the deputy surveyors to comply with the Manual of Surveys, but it is assumed that the allotments can be effected without waiting for these corrections from the triplicate plats of these surveys, which have been forwarded by the surveyor-general of Utah.

Very respectfully,

W. A. RICHARDS,
*Commissioner.*

The COMMISSIONER OF INDIAN AFFAIRS,
*Washington, D. C.*

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, February 3, 1905.*

SIR: This office is in receipt of your communication "E," dated January 31, 1905, in which you state that the township and subdivision surveys in the Uintah Indian Reservation, which were made necessary by the act of Congress providing for the opening of the reservation to entry, have been completed in the field, and allotments to the Indians can be undertaken whenever practicable for this office to proceed with the same. You add that certain corrections of lines and corners on the ground may yet be required of the deputy surveyors to comply with the Manual of Surveys, but it is assumed that the allotments can be effected without waiting for these corrections from the triplicate plats of these surveys, which have been forwarded by the surveyor-general of Utah.

In reply to your suggestion that the allotments to the Indians can be undertaken whenever practicable for this office to proceed with the same, you are advised that it will be practicable to proceed with the allotments as soon as the returns of the surveys are received in this office. If it be not practicable to furnish this office at once with the triplicate plats, owing to the corrections that are required, it is requested that it be furnished with photographic copies of said plats and with the triplicate field notes. The cost of photographing the plats can be defrayed from the appropriation of $5,000 made by the Indian appropriation act approved April 21, 1904, to enable the Secretary of the Interior to do the necessary



surveying and otherwise carry out the purposes of so much of the act of May 27, 1902, as provides for the allotment of the Indians of the Uintah and White River Utes in Utah.

Very respectfully,

C. F. LARRABEE,
*Acting Commissioner.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., February 6, 1905.*

SIR: The act of May 27, 1902 (32 Stat. L., 263), provided that the Secretary of the Interior should cause to be allotted lands to members of the Uintah and White River tribes of Ute Indians prior to October 1, 1903, on which date all the unallotted lands within said reservation should be restored to the public domain, and that persons entering any of said lands under the homestead law should pay therefor at the rate of $1.25 per acre.

Under the act of July 1, 1902 (32 Stat. L., 575), the Secretary of the Interior was authorized and directed to cause an estimate to be made and submitted to Congress at the beginning of its next session for the survey of the Uintah Reservation, in Utah, and other reservations therein named.

In accordance with this act estimates were submitted and by the act of March 3, 1903 (32 Stat. L., 997), there was appropriated for the survey of the Uintah Reservation and the other reservations named in the foregoing act $175,000, and in the same section of the same act it was provided that the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May 27, 1902, be extended to October

1, 1904. Under date of March 23, 1903, the Department inclosed to this Office copy of Indian Office letter and directed the survey of the Uintah Reservation. The matter was at once taken up with the surveyor-general of Utah. Advertisements for proposals were authorized, in response to which bids were received, submitted to this Office and to the Department, and under date of July 15, 1903, the surveyor-general of Utah was advised of departmental concurrence and authorized to let 18 contracts, covering the entire unsurveyed portion of the reservation. These contracts were let, submitted to this Office and approved, and the surveyor-general advised and instructed to order the deputies into the field.

Under date of February 3, 1904, the Secretary of the Interior made inquiry of this Office as to the probable time necessary to complete the surveys of the Uintah Reservation, with a view to bringing the matter to the attention of Congress, providing such surveys could not be completed prior to October 1, 1904. On February 4, 1904, this Office stated that "none of the contracting surveyors had completed their field work, and expressed the opinion that the work in the field, the office work on the plats and field notes by the surveyor-general's force, the field inspection, and subsequent office examination here would require the whole of the next surveying season, and that the date of said opening should be postponed at least another year."

This report was transmitted to Congress by the Secretary February 6, 1904, in which he stated that after the completion of the surveys some 1,600 allotments were to be made, which would require at least three or four months, or probably longer, as the act provides for the allotment of agricultural lands that can be irrigated. He therefore recommended that the date for said opening be extended for one year from October 1, 1904.

An amendment to the Indian appropriation bill for the year ending June 30, 1905, extending such time to October 1, 1905, passed the House, but said amendment was stricken out in the Senate. The conference committee adopted a compromise date, viz., March 10, 1905, and this provision is a part of the act of April 28, 1904. (33 Stat. L., 207.) See Congressional Record, Fifty-eighth Congress, second session, page 4632, for conference report.



As suggested in my report of February 4, 1904, the whole of the surveying season of 1904, and in fact up to January 1, 1905, was required within which to complete the surveys of the reservation and the examination of the surveys in the field. The office work necessary in connection with said surveys could be completed prior to March 10, 1905, but a large number of allotments to Indians remain to be made. In view of the climatic conditions existing at this season of the year, and the fact that such allotments must be made of agricultural land that can be irrigated, it is not possible that such allotments can be made prior to March 10, 1905.

Very respectfully,

W. A. RICHARDS,
*Commissioner.*

The SECRETARY OF THE INTERIOR.

**S. Rep. No. 4240, 58th Cong., 3d Sess. (1905) (LD 102)**

SENATE

58th Congress, 3d Session Report No. 4240

# INDIAN APPROPRIATION BILL.

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FEBRUARY 20, 1905.—Ordered to be printed.

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Mr. STEWART, from the Committee on Indian Affairs, submitted the following

## REPORT.

[To accompany H. R. 17474.]

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, February 1, 1905.*

The SECRETARY OF THE INTERIOR.

SIR: I have the honor to acknowledge receipt, by Department reference of January 30, of a copy of S. 6867, "A bill to provide the manner of opening for settlement and entry and for disposition of certain lands in the Uintah Reservation in Utah." The reference is for report.

The bill provides that the unallotted lands, excepting such tracts as may have been set aside as a national forest reserve, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, to be opened to settlement and entry by



proclamation of the President, which shall prescribe the manner in which said lands may be settled upon, occupied, and entered by persons entitled, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in the proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry. A provision is made to protect the rights of soldiers and sailors, as defined in sections 2304 and 2305, Revised Statutes, and as amended by the act of March 1, 1901. It provides, further, that all lands opened to settlement and entry under this act remaining undisposed of at the expiration of five years after the act is approved shall be sold and disposed of for cash under rules and regulations to be prescribed by the Secretary of the Interior, not more than 640 acres to any one person; the proceeds of the sale of such lands to be applied as provided in the act of Congress of May 27, 1902, and the acts amendatory thereof and supplemental thereto.

It is to be noted that this bill refers to the time for opening to public entry the unalloted lands on the Uintah Reservation in Utah as having been fixed by law as the 10th day of March, 1905.

The Indians have not been allotted, and it will not be possible to complete the allotments by the time indicated. The Indian appropriation bill as it passed the House of Representatives contains a provision deferring the opening of the unallotted lands until September 1, 1905, unless the President shall determine that the same can be opened at an earlier date.

If the bill is amended so as to be in harmony with this provision, there is no reason known to this Office why the measure should not become law.

As the manner of opening Indian reservations to entry and settlement after the lands are restored to the public domain is a matter that comes within the jurisdiction of

the General Land Office, it is suggested that the bill be referred to that Office.

Very respectfully,

F. E. LEUPP,
*Commissioner.*

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., February 14, 1905.*

The SECRETARY OF THE INTERIOR.

SIR: I have for report Senate bill 6867, entitled "A bill to provide the manner of opening for settlement and entry and for disposing of certain lands in the Uintah Reservation in Utah."

This bill provides, among other things, that the unallotted portions of land within the Uintah Indian Reservation in the State of Utah—

> excepting such tracts as may have been set apart as a national forest reserve, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof * * *.

Attention is called to the fact that under act of May 27, 1902 (32 Stat., 263), these lands were to be simply "restored to the public domain," and could, consequently, under that statute be appropriated under any of the public-land laws, while the pending bill provides that they "shall be disposed of under the general provisions of the homestead and town-site laws of the United States."



Possibly doubt may arise in determining whether the proposed bill will repeal the act of May 27, 1902, in so far as that act would permit entries under other than the homestead and town-site laws, and for the purpose of removing any possible doubt on this subject I would suggest that the word "only" be inserted between the words "of" and "under" in line 10, on page 1.

Attention is also called to the fact that this bill excepts from entry only "such tracts as may have been set aside as a national forest reserve," created from the unreserved lands, but does not exclude from such lands the grazing lands provided for the Indians by joint resolution of June 19, 1902 (32 Stat., 744), and act of March 3, 1903. (32 Stat., 998.)

It is therefore suggested that the pending bill be amended by adding, after the word "reserve," at the end of line 9, page 1, the words—

> and the land to be set apart for the Uintah and White River Utes and other Indians, south of the Strawberry River on said reservation, not to exceed two hundred and fifty thousand acres.

The date for the opening of these lands has been changed from October 1, 1903 (32 Stat., 263), to October 1, 1904 (32 Stat., 998), then to March 10, 1905 (33 Stat., 207), and while the surveys of said reservation have been completed allotments have not been made to the Indians, and, as mentioned in the report of the Commissioner of Indian Affairs, the Indian appropriation bill as it passed the House of Representatives contains a provision deferring the opening of the unallotted lands until September 1, 1905, unless the President shall determine that the same can be opened at an earlier date.

The provisions of this bill prescribing the manner in which the lands are to be opened are similar to the provisions under which the Rosebud Indian Reservation, in

South Dakota, and the Devils Lake Indian Reservation, in North Dakota, were opened during the past year. This method was first tried in the opening of lands in Oklahoma, and it is believed that the wisdom of the plan has been sufficiently demonstrated to justify its adoption in this instance. It has been demonstrated that this method of disposing of public lands materially lessens the number of expensive contests which former methods provoked.

I have, therefore, to recommend that after the bill has been amended as above suggested it be enacted into law.

Very respectfully,

W. A. RICHARDS,
*Commissioner.*

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**Excerpts from 39 Cong. Rec. (1905) (LD 103)**

CONGRESSIONAL RECORD—HOUSE

JANUARY 21

[1179] INDIAN APPROPRIATION BILL

The committee resumed its session.
The Clerk read as follows:

That so much of the act of March 3, 1903, as provides that the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution No. 31, of June 19, 1902, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.

Mr. FINLEY. I desire to reserve the point of order on this paragraph, line 5, down to and including line 11, for the purpose of having some explanation.

Mr. SHERMAN. The original act provided for setting aside 250,000 acres for grazing land for these Indians, and provided for locating it at a point in the reservation south of the Strawberry River. Now it appears that the Indians are located north of the Strawberry River, and from 40 to 60 miles therefrom, so that under the provision of the law the location must be at a distance of from 40 to 60 miles from where the Indians are located, and that the land is no better. This provision removes that restriction and permits the location north of the Strawberry. It does not change the amount to be set aside; it does not change the law as to the setting aside of the land for pasture, but simply makes it possible for the Department to make the location north of the Strawberry; nearer where the Indians are now located.

Mr. FINLEY. I simply wanted to know if the provision was in the interest of the Indians or in the interest of the cattle owners.

Mr. SHERMAN. It is in the interest of the Indians, and is inserted here at the recommendation of the Department.

The CHAIRMAN. The gentleman from South Carolina withdraws the point of order.

Mr. HOWELL of Utah. Mr. Chairman, I offer the following amendment.

The Clerk read as follows:

> After line 11, page 38, insert "but the land so set apart in pursuance of said resolution of June 19, 1902, shall not exceed 250,000 acres."

Mr. HOWELL of Utah. Mr. Chairman, in explanation of the amendment I wish to say that the resolution of June 19, 1902, simply authorized the Secretary of the Interior to set apart such a quantity of grass land as might subserve the purposes of the Indians. The act of March 3, 1903, provided that the lands that were set apart for the grazing of live stock of the Indians should be located on the south side of the Strawberry River. In the opinion of some attorneys whom I have consulted in regard to this matter, the present section repealing the act of March 3, 1903, might be construed to also repeal the limitation of 250,000 acres; therefore, to remove any doubt and to establish the fact for a certainty that the limitation of 250,000 acres is to stand, I have offered this amendment.

Mr. SHERMAN. Mr. Chairman, I think this amendment is absolutely unnecessary. The gentleman from Utah called my attention to it, and I told him so then, and to make assurance doubly sure, I submitted it to the Department, to the Secretary, and he submitted it to his law officer, who writes me that "as to the suggestion of Mr. HOWELL, that it should be made clear that the grass lands are not to exceed 250,000 acres. The Commissioner suggests, and I agree, that the bill as it now stands modifies existing legislation only as to the condition of the grass land, leaving the quantity intact as to the number of acres set aside for that purpose."



So it seems to me, Mr. Chairman, that this amendment is entirely unnecessary.

The question was taken; and on a division (demanded by Mr. SHERMAN) there were—ayes 7, noes 29.

So the amendment was rejected.

[1180] The Clerk read as follows:

> That the time for opening the unallotted lands to public entry on the Uintah Reservation in Utah, as provided by the acts of May 27, 1902, and March 3, 1903, and April 21, 1904, be, and the same is hereby, extended to October 1, 1905: *Provided*, That so much of said lands as will be under the provisions of said acts restored to the public domain shall be open to settlement and entry by proclamation of the President of the United States, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons intending to make entry thereon; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars or Philippine insurrection, as defined and described in sections No. 2304 and No. 2305 of the Revised Statutes, as amended by the act of March 1, 1901, shall not be abridged.

Mr. SHERMAN. Mr. Chairman, I offer the following amendment.

Mr. HOWELLof Utah. And to that amendment, Mr. Chairman, I make a point of order on the ground that it repeals existing law and is new legislation.

Mr. SHERMAN. Does the gentleman make the point of order or reserve it?

Mr. HOWELL of Utah. I will reserve the point of order to hear the amendment.

Mr. SHERMAN. Then, Mr. Chairman, I ask that the Clerk read the amendment which I offer.

The CHAIRMAN. The Clerk will read the amendment for the information of the committee.

The Clerk read as follows:

> Page 38, line 17, after the word "five," insert "unless the President shall determine that the same may be opened at an earlier date."

Mr. SHERMAN. Now, Mr. Chairman, just a word. Of course I do not contend for a moment that the amendment is not subject to a point of order. It does change existing law. I had discussed the subject with the gentleman from Utah, and I certainly understood from the conversation that this modification was in line with his ideas; that he thought it was wise; and, in fact, the amendment was in part drawn to conform with his ideas on the subject, and I am a bit astonished that the gentleman now rises to a point of order against the amendment. But if he does raise it I shall not attempt to argue that it is in order.

Mr. HOWELL of Utah. With that explanation, Mr. Chairman, I will withdraw the point of order. Now, I desire to offer an amendment to the entire section.

The CHAIRMAN. The question is first on agreeing to the amendment proposed by the gentleman from New York.

The question was taken, and the amendment was agreed to.

The CHAIRMAN. The gentleman from Utah offers the following amendment, which the Clerk will report.

The Clerk read as follows:

> That the time for opening the unallotted lands to public entry on the Uintah Reservation in Utah having been fixed as the 10th day of March, 1905, it is hereby provided that so much of said lands as will be under the provisions of said acts restored to the public domain shall be open to settlement and entry



> by proclamation of the President of the United States, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons intending to make entry thereon; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of four months from the time when the same are opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars or Philippine insurrection, as defined and described in sections 2304 and 2305 of the Revised Statutes, as amended by the act of March 1, 1901, shall not be abridged: *And further provided*, That for one year immediately following the restoration of said lands to the public domain said lands shall be subject to entry only under the homestead, town-site, and mining laws of the United States.

Mr. HOWELL of Utah. Mr. Chairman, I desire to discuss briefly some matters pertaining to the Uinta Indian Reservation, in Utah, and as a preface to my remarks will give a short description of said reservation, same being taken from the comprehensive report of Mr. Cyrus C. Babb, of the Geological Survey. It is located in northeastern Utah, and was set aside by executive order of President Lincoln on October 3, 1861, which order was subsequently approved by four acts of Congress, the latest hearing date of May 24, 1868. The reservation includes almost entirely the drainage basin of the Duchesne River with its main tributary, Uinta River. The total area is 2,039,040 acres, of 3,186 square miles. Its northern boundary is the divide of the Uinta Mountains, whose peaks attain an elevation of over 13,000 feet. Its western boundary is a portion of the Wasatch Range, while its southern boundary is an irregular line over the rolling country between the basin of the Minnie Maud Creek and the small tributaries of the Duchesne.

Green River forms the boundary for a short distance at the southeastern extremity. The eastern boundary as originally surveyed was afterwards modified by act of Congress approved May 24, 1888, in order to exclude the so-called "strip," a triangular area of 7,000 acres east of Fort Duchesne, which contains valuable uintaite or gilsonite deposits. The greatest due east-west length is about 75 miles, with a north-south width of approximately 60 miles.

The northern part of this reservation is of great altitude and is densely wooded; it is in this part that all water courses draining the reservation find their source. This particular portion will not be thrown open to entry, but is to be set aside as a forest reserve and will later be incorporated with the present Uintah Forest Reserve.

I wish also to embody in my remarks the legislation enacted by Congress with a view to allotting to the Indians resident on the reservation lands in severalty in order that the remainder or excess of lands within the reservation might be restored to the public domain and thus be made available for entry and settlement. The Indian appropriation act of May 27, 1902, contains, among others, these provisions:

> That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family 80 acres of agricultural land, which can be irrigated, and 40 acres of land to each other member of said tribes, said allotments to be made prior to October 1, 1903, on which date all the unallotted lands within said reservaiton shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of $1.25 per acre: *And provided further*, That nothing herein contained shall impair the rights of any mineral lease which has



been approved by the Secretary of the Interior or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed 640 acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate 100 mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions, and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of $70,064.48 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

Said item of $70,064.48 to be paid to the Uintah and White River Utes covers claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and from which the Government has received from said Uncompahgre Indians money aggregating $60,064.48; and the remaining $10,000 claimed by the Indians under an act of Congress

detaching a small part of the reservation on the east, and under which act the proceeds of the sale of the lands were to be applied for the benefit of the Indians.

On June 19, 1902, about three weeks after the passage of the act from which I have just quoted, joint resolution 31, supplementing and modifying certain provisions of said act, was approved. The particular clauses of this joint resolution bearing on the Uintah Indian Reservation are as follows:

> In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation, in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein, at one or more places, as will subserve the reasonable requirements of said Indians for the grazing of live stock.
>
> All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of 80 acres to each head of a family and 40 acres to each other Indian, and no more. The grazing selected and set apart as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named.

It will be observed that originally provision was made for throwing open to entry this reservation on October 1, 1903. The Indian appropriation bill approved March 3, 1903, provided, however, that the date of the opening be deferred for one year—that is to say, to October 1, 1904—and otherwise modified the provisions of joint



resolution 31, already referred to, in the following language:

> To enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the purposes of the act of May 27, 1902, making appropriations for the current and contingent expenses of the Indian Department for the fiscal year 1903, and for other purposes, as provides for the allotments of the Indians of the Walker River Reservation, in Nevada, and the Uintah and White River Utes, in Utah, and the joint resolution of June 19, 1902, providing for the allotment of the Indians of Spokane Reservation, in Washington, to be immediately available, $175,000: *Provided, however*, That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands, as directed by the act of May 27, 1902, and if their consent as therein provided can not be obtained by June 1, 1903, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and [1181] White River Ute Indians the quantity and character of land named and described in said act: *And Provided further*, That the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution No. 31, of June 19, 1902, be confined to the lands south of the Strawberry River, on said Uintah Reservation, and shall not exceed 250,000 acres: *And provided further*, That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the act of May 27, 1902, be, and the same is hereby extended to October 1, 1904.
>
> That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, and other like substances, which were reserved from location and entry

by provision in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June 30, 1898, and for other purposes," approved June 7, 1897, all discoveries and locations of any such mineral lands by qualified persons prior to January 1, 1891, not previously discovered and located, who recorded notices of such discoveries and locations prior to January 1, 1891, either in the State of Colorado or in the office of the county recorded of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral-land laws: *Provided*, That the owners of such locations shall relocate their respective claims and record the same in the office of the county recorder of Uintah County, Utah, within ninety days after the passage of this act. All locations of any such mineral lands made or recorded on or subsequent to January 1, 1891, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even-numbered sections, shall be sold and disposed of in tracts not exceeding 40 acres, or a quarter of a quarter of a section, in such manner and upon such terms and with such restrictions as may be prescribed in a proclamation of the President of the United States issued for that purpose not less than one hundred and twenty days after the passage of this act, and not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress,



On February 6, 1904, the honorable Secretary of the Interior, in a communication addressed to the chairman of the House Committee on Indian Affairs, requested that the time for opening the reservation be again extended, this time to October 1, 1905, which request was based on a letter from the honorable Commissioner of the General Land Office to the effect that the necessary surveys of the reservation could not be completed, and the required allotments made by the date previously fixed. The House acceded to his request by incorporating such a provision in the Indian appropriation bill; the Senate however, amended this provision by fixing March 10 as the date for the opening. This amendment finally carried. The particular clause bearing on this subject is as follows:

> That the time for opening the unallotted lands to public entry on the Uintah Reservation in Utah, as provided by the acts of May 27, 1902, and March 3, 1903, be, and the same is hereby, extended to March 10, 1905, and $5,000 is hereby appropriated to enable the Secretary of the Interior to do the necessary surveying, and otherwise carry out the purposes of so much of the act of May 27, 1902, making appropriation for the current and contingent expenses of the Indian Department for the fiscal year 1903, and for other purposes, as provides for the allotment of the Uintah and White River Utes in Utah.

Now, in contemplation of these several acts expressing the well-defined intention of Congress to secure a speedy opening of this reservation, I am constrained to regard the dilatory action of the Department of the Interior as evincing an utter lack of good faith and due diligence in carrying out the law. We are now confronted with another request for a further extension of time, this time to October 1, 1905.

I, for one, desire to protest vigorously here and now, against this further delay and, as a basis for my protest will state that so great an extension of time as has been

asked for, does not seem to be at all necessary. I lately addressed the honorable Commissioner of the General Land Office requesting information as to the present status of the surveys now being made of the lands in the reservation and received in reply the letter I will now read:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D.C., January 14, 1905.*

Hon. JOSEPH HOWELL,
*House of Representatives.*

SIR: I have your letter of the 12th instant inquiring as to the progress made with the surveys within the Uintah Indian Reservation. You state that you understand that the "surveys which are now all completed will be accepted and approved by the Department," and you also understand that "until the surveys are accepted, the allotments to the Indians as provided for in the act of May 27, 1902, opening the reservation to entry, can not be undertaken."

In reply I have the honor to state that the field work of said surveys has been executed and the plats and field notes thereof are now before this office for consideration, the last of the surveys having been received on the 6th instant. The force of office examiners is now engaged upon the returns and comparing them with the inspectors' reports. Probably the entire eighteen contracts will have been considered by the first of next month, and whether action on all these surveys will be favorable or not I am unable at present to state. The work is being pushed as rapidly as the force at my disposal will permit.

I am informed that some allotments have already been made in the field based on the old surveys (about twenty-five townships) but that further allotments must necessarily await the acceptance of the



surveys by this office, and upon informal consultation at the Indian Office I am advised that it is essential that the allotments to the Indians should be made in the field, which would seem to be impracticable before next summer.

Very respectfully,

W. A. RICHARDS,
*Commissioner.*

From this letter it is apparent that there is no necessity for such an extension as has been proposed; it is reasonable to assume that the surveys, having now been completed, will have been approved and accepted within a month, or at least before March 10, the date last fixed by law for the restoration of the unallotted lands to the public domain. It is further shown that partial allotments to the Indians have already been made, and why it should require so much additional time to complete them is not clear. The character of these lands is not unknown; a thorough investigation of them was made by Mr. Cyrus C. Babb, under the direction of Mr. F. H. Newell, chief hydrographer of the Geological Survey, as long ago as 1899, and the results of his investigation communicated to the Department of the Interior and to the House.

It is entirely reasonable to suppose that the locations of the best lands—those which should be allotted to the Indians—are already known and decided on; from which it would follow that the remaining allotments could be completed early in the spring. The climatic conditions there are not so rigorous that the work of allotment need be delayed until the summer time.

When the question was up before us during the last session of Congress, the then Commissioner of Indian Affairs declared that, when the surveys were completed and everything in readiness for making allotments, thirty days would suffice for completing this work.

The gentleman from New York [Mr. SHERMAN] stated here that, as he understood it, I had assented to the prop-

osition to authorize the President, at his discretion, to designate the time and prescribe the rules and regulations under which the unallotted lands of the reservation might be entered and settled upon.

I fear he misunderstood me to a certain extent. My idea was rather to leave the law as it now stands—that is to say, that provision of the law designating the 10th of March, 1905, as the date of the opening—and then for us now to authorize the President, in whose wisdom and discretion I have complete confidence, to prescribe such rules and regulations for entry and settlement of land as in his judgment would seem most proper, and also to fix a time when the same might be entered upon. The amendment which I have offered provides that four months shall elapse from the date (March 10) already fixed by law for the opening, until settlers are permitted to make entries, and authorizes the President to prescribe the manner thereof. This additional four months' extension of time would be ample, in my judgment, to permit of the completion of the work of allotment, as it also would give the President time to draft the proper rules and regulations to be followed.

The provisions of the bill now under discussion, however, indicate on the part of Congress a sanction and acceptance of the dilatoriness and seeming negligence on the part of those charged with the carrying out of past enactments. I fear that our favorable action on the bill in its present form will be construed as an approval and warrant for still further delays. Summing up what I have just said, I would favor leaving the date of the opening March 10, and giving the President discretion to defer the actual opening until such time as seems necessary, rather than to extend the time to October 1, "unless," in the words of Mr. SHERMAN's amendment just offered, "the President shall determine that the same may be opened at an earlier date."

The interest and welfare of the Indians should be carefully considered and jealously guarded; they are the wards



of the Government, and justice and humanity demand for them fair and honorable treatment. Were it not for these considerations and the hope of securing the amendment I have offered I would insist on the point of order raised.

The portion of the bill we are now discussing contains, in addition to a considerable extension of time, important and necessary provisions authorizing the President to prescribe rules and regulations for the entry and settlement of these lands. Without some orderly method of determining priority of right to locate lands there will result, in all probability, contention and disorder and perhaps violence in the rush and scramble to get first choice. This legislation is therefore in the highest degree necessary, and in view of the amendment proposed by the gentleman from New York I have withdrawn the point of order made, and have offered my amendment, already read, as a substitute therefor.

I have been compelled, with much reluctance and regret, to recognize the necessity for an extension of time. Personally, though, I have felt that sixty days additional would be ample; but, not desiring to set up my judgment as superior to that of [1182] the Secretary of the Interior —who, while this same matter was under discussion last winter, advised the gentleman from New York, the chairman of the Indian Committee, that the allotments to the Indians could be made in from three to four months' time —accordingly I have so framed my amendment as to fix the date for actual settlement and entry at four months from the date now fixed, or July 10, 1905.

I repeat, I greatly deplore the necessity for any extension of time at all, because thereby is involved the loss of practically one year to the settlers and home makers. If entry could be made immediately after March 10, there would be sufficient of the spring remaining to get crops in. It will be apparent that a very slight delay only will render this impossible. Right here I wish to read a letter, a sample of many similar ones sent to me, which I have

just received from a gentleman residing in the neighborhood of the reservation, which shows very graphically the seriousness of delay at all:

VERNAL, UTAH,
*January 13, 1905.*

Hon. JOSEPH HOWELL, *Washington, D.C.*

DEAR SIR: I see by the Deseret News that you are trying to have the opening of the reservation postponed until the middle of May, and I thought I would write and ask if you realized the situation here—that there are hundreds of people here waiting for the opening, and if they are allowed to go on the reservation on the 10th day of March, they can get their land and take out ditches and raise a crop sufficient for themselves; whereas if it is put off until the middle of May they will be unable to do anything in this line until next year. And they are a class of people who will greatly suffer and will have to seek employment elsewhere if they are prevented from raising a crop this year.

Yours, truly,

L. JOHNSON.

But it may be contended by some that inasmuch as a certain delay is inevitable and that the delay involving as it does the loss of one season's crop and effort, it would matter very little if the opening shall be deferred to October 1, 1905, as advocated by some; or, in other words, it would be a matter of small moment whether July 10 or October 1 should be fixed as the time. Replying to this imaginary contention, I might say that if perchance the President exercises the discretion allowed him and should not declare the reservation open until October 1, the date fixed by the bill, it would then be as impossible for intending settlers to do the pioneer work of subduing the soil, getting out canals and ditches, and planting their fall crops, as it is now impossible, because of the rigors of winter, to proceed with the work of allotment to the



Indians. If, on the other hand, my amendment shall carry, intending settlers can enter upon the land in midsummer, homes can be built, the land cleared, canals constructed, fall plowing and planting accomplished, and an excellent start thus made toward future prosperity. The proposition to open these lands just on the threshold of winter is preposterous and ill-conceived; it can be justified only from the standpoint of the speculator and land grabber. It is decidely adverse to the home seeker and home builder.

In this connection there is another matter of great importance and one which should receive the earnest attention of Congress. In the pending bill these lands, when restored to the public domain, are subject to entry under the general land laws of the United States, coupled with such rules and regulations as the President may prescribe. In my humble judgment there should be some provision such as is embodied in my amendment, limiting the lands in the reservation to entry under the homestead, townsite, and mining laws alone for one year from the date of the opening.

With the full development of the resources of this portion of the State of Utah will come also a capacity for supporting a numerous and thrifty population. Congress should see to it that until such time as those lands easy of access, reclamation, and irrigation are settled by actual home makers the provisions of the homestead law alone shall prevail. This policy is in accord with the dominant sentiment of the time, viz, that the public lands shall be reserved for actual homes for the people.

It may be found necessary later on for the future development of that section of the State to permit the lands to be acquired under the other land laws, but one year at least should elapse to give actual homesteaders a reasonable time for preferential entry before the other laws apply.

Under the provisions of the act of May 27, 1902, certain mining companies were given special rights and privi-

leges. At the time this law was enacted it was thought, no doubt, that the companies securing these valuable concessions would on October 1, 1903, the original date for opening the reservation, be compelled to make a location of the mineral lands granted them. Indignation has been general and widespread that these private mining companies should have been given such valuable concessions and advantages over others, but it is only fair to assume that if all the circumstances were known leading up to the granting of these concessions and privileges the public might be disposed to a home charitable view of the matter. Certainly, though, it could not have been in the mind of Congress that these companies, whose supposed rights were so carefully safeguarded, would, after October 1, 1903, be permitted to continue to profit by successive postponements. The facts as they appear with reference to these favored companies are not of a character to soothe one's feelings. Instead of making their locations by October 1, 1903, to which time they were originally limited under concessions granted them, they have continued from that time to the present (and will no doubt still continue) to prospect the reservation for the valuable minerals known exist there and to exploit it to their own advantage, while the dear public are strictly excluded and not permitted to interfere.

Every delay in throwing open the reservation to entry and settlement is directly in the interest of these favored concessionaires. They have, without doubt, not only long since determined on the locations most favorable to them, which they are entitled to make, but also as to other locations of minerals, which will give them an immense advantage over other prospectors when the opening actually occurs by enabling them to at once set up claims on prospects they have had ample time to discover.

It appears from data on file in the Interior Department that one of the concessionaires, the Raven Mining Company, has paid no royalty, as required under the terms of its lease, since December 31, 1902, and refuses to recog-



nize any liability for such royalty since October 1, 1903. This corporation has grown particularly arrogant in its claims and appears to flourish in its mercenary designs. The forfeiture clause of the lease made to this company reads as follows:

> XIV. In the event of any omission, neglect, or failure of the party of the second part to faithfully observe and perform any of its obligations arising upon and under the provisions of this lease, the Secretary of the Interior may, without prejudice to any other lawful remedy or remedies, treat the same as a sufficient cause for the forfeiture, abrogation, or termination of this lease by him unless within sixty days after notice thereof from the Secretary of the Interior the party of the second part shall fully correct such omission, neglect, or failure and make good any loss or injury occasioned thereby, and if after such notice and within the time named the party of the second part shall not fully correct such omission, neglect, or failure and make good any loss or injury occasioned thereby, or if thereafter such omission, neglect, or failure of the party of the second part shall be repeated, then at any time within sixty days thereafter the Secretary of the Interior may, at his option, declare this lease forfeited, abrogated, and terminated; and if this lease shall be so forfeited, abrogated, or terminated then and in that case the party of the second part shall wholly vacate the leased premises within thirty days of notice thereof, and upon failure of the party of the second part to vacate said premises the Secretary of the Interior shall have the right, on behalf of the Indians, to reenter the same and take possession thereof, using such force as may be deemed necessary to dispossess and remove therefrom the said party of the second part; and it is agreed and understood that any property of said party of the second part located on said premises at the time of such forfeiture, abro-

gation, or termination of this lease may be removed therefrom by the party of the second part within such reasonable time as may be fixed by the Secretary of the Interior, not to exceed six months from the forfeiture, abrogation, or termination of the lease, and any property of the party of the second part remaining upon the said premises after the expiration of the time so fixed for its removal shall thereupon become the property of said party of the first part and may be treated as such by the Secretary of the Interior: *Provided, however*, That the party of the second part shall have six months in which to remove its building, machinery, and other property from said lands, without hindrance by the party of the first part, if the party of the second part has performed all of the covenants and conditions imposed upon it by this lease.

Notwithstanding the plain terms of this lease, the said company takes on a defiant attitude toward the Government and, for reasons not discernible, no effective steps are taken to enforce the terms of the lease. The public residing in the neighborhood realize that these mining companies under the wide latitude allowed them have enjoyed exclusively the favored privilege of exploring and prospecting for minerals throughout the reservation; and, appreciating to the full extent such a discrimination against them and in favor of the companies, arouses within them a feeling of righteous indignation. It is manifestly a rank injustice and ought never to have been permitted; but regrets are now unavailing, and the proper thing is to stop it at the earliest possible moment.

In conclusion, I want to say that it will be for the best interest of the Indians to have the reservation speedily opened and settled. It is a locality rich in varied resources and possessing a fine climate. A great variety of minerals are known to exist there and a goodly portion of the land is well adapted to agriculture and fruit raising. With the opening will come a healthy development and there



will spring up many thrifty communities, both mining and agriculture, such as my State is famed for. The Indians will thus be brought into closer touch with up-to-date industrial methods and will be stimulated thereby to habits of thrift and industry; and within a few years this will appear as one of the favored spots of the earth. [1183] Mr. SHERMAN. Mr. Chairman, the gentleman from Utah naturally and properly looks upon this subject from the point of view of his constituents, the white people of Utah. I am looking upon it from the view point of the Indian's interests. Now, the Secretary, under the date of December 10, writes me—I will not read much of the letter—"It is quite certain that very little of this work"—that is, of the allotment work—"can be done in any event during the winter season, and as the said act requires that allotment shall be made before the lands are thrown open it is not believed to be possible to comply with such requirement in time to open the unallotted land to public entry on March 10, 1905." Now, because of that we ask for an extension until October. He proceeds in the letter to expressly ask that the act be amended so as to provide for the opening in October rather than in March.

Mr. HOGG. Mr. Chairman, may I ask the gentleman a question?

Mr. SHERMAN. Certainly.

Mr. HOGG. I would like to know if these surveys have been passed upon by the Government and approved?

Mr. SHERMAN. I understand not.

Mr. HOGG. I should like to know further, Mr. Chairman, if the Department has given any information as to the number of allotments already made to the Indians?

Mr. SHERMAN. They have not.

Mr. HOGG. Do you know whether this is being done?

Mr. SHERMAN. It is, as I understand it; I understand the work is now progressing.

Mr. HOGG. I had understood, Mr. Chairman, from the Commissioner that the surveys had been completed for some considerable time.

Mr. SHERMAN. This letter of December 10 states they are not; that is my information on the subject.

Mr. HOWELL of Utah. Mr. Chairman, with the permission of the gentleman, I would like just to read a part of a letter from the honorable Commissioner of the General Land Office:

In reply I have the honor to state that the field work of the said surveys has been executed, and the plats and field notes thereof are now before this office for consideration, the last of the surveys having been received on the 6th instant. The force of office examiners is now engaged upon the returns and comparing them with the inspectors' reports. Probably the entire eighteen contracts will have been considered by the 1st of next month, but whether action on all of these surveys will be favorable or not I am unable at present to state, but the work is being pushed as rapidly as the force at my disposal will permit.

Mr. SHERMAN. Now, Mr. Chairman, that letter itself, it seems to me, discloses that we ought not to attempt to open this reservation on the date of March 10. The letter itself says while the field work is completed, the notes only were received on the 5th day of January. None of the surveys are complete, and the suggestion of the Commissioner is that they will not be completed until the 1st of February next.

Mr. HOWELL of Utah. Will the gentleman from New York yield for a moment?

Mr. SHERMAN. Certainly.

Mr. HOWELL of Utah. Does the gentleman from New York understand this amendment does not propose to open these lands for settlement until the 10th day of July, nearly five months from the estimated time of the completion of the surveys?

Mr. SHERMAN. The amendment undertakes to do this: To restore this to the public domain on the 10th of March, and then on the 10th of March to require the President to issue a proclamation for the opening of the reservation four months thereafter.



Now, Mr. Chairman, the gentleman from Utah [Mr. HOWELL] was thoughtful and considerate enough to present his amendment to me, I think the night before last, and I sent it down at once to the Department for a report thereon and for an opinion in reference thereto.

The CHAIRMAN. The time of the gentleman from New York [Mr. SHERMAN] has expired.

Mr. SHERMAN. Mr. Chairman, I ask unanimous consent that I may be permitted to proceed for five minutes.

The CHAIRMAN. The gentleman from New York [Mr. SHERMAN] asks unanimous consent that he may be permitted to proceed for five minutes. Is there objection? [After a pause.] The Chair hears none.

Mr. SHERMAN. Under date of yesterday, the officer having the fullest knowledge of the entire situation and of the entire condition, the official superior to the Commissioner of the General Land Office, the Secretary of the Interior, writes me acknowledging the receipt of the amendment of the gentleman from Utah [Mr. HOWELL] and distinctly states that he is opposed to the amendment as not for the best interests of the Indians and asks that the provision as printed in the bill remain undisturbed.

And those are the interests that the members of the committee are helping to protect.

Mr. HOWELL of Utah. Mr. Chairman, I would like to ask the gentleman from New York [Mr. SHERMAN] a question.

The CHAIRMAN. Does the gentleman from New York [Mr. SHERMAN] yield to the gentleman from Utah [Mr. HOWELL]?

Mr. SHERMAN. Certainly.

Mr. HOWELL of Utah. I would like to ask the chairman of the Committee on Indian Affairs what the reasons are that occur to his mind that would injure the Indians to have these lands, for the first year, at least, preserved for actual home builders rather than to be entered under the present land laws and the timber and stone act, etc.? I see no reason why it should injure the Indians.

Mr. SHERMAN. I do not see any special reason myself, so far as that is concerned. But permit me to finish the reading of the letter.

Now, that is the recommendation of the Department made yesterday with the fullest and latest information at hand. I therefore trust——

Mr. STEPHENS of Texas. Mr. Chairman, I desire to ask the gentleman from New York [Mr. SHERMAN] this question.

The CHAIRMAN. Does the gentleman from New York [Mr. SHERMAN] yield to the gentleman from Texas [Mr. STEPHENS]?

Mr. SHERMAN. Certainly.

Mr. STEPHENS of Texas. I desire to ask whether these lands are thrown open under the existing law? What provision is made under the existing law if they are restored to the public domain and are to be opened under the general land laws of the nation?

Mr. SHERMAN. This amendment under consideration proposes to open them under a proclamation by the President, which shall lay down rules and regulations for their opening, the idea being to have such rules and regulations as were prescribed, for instance, in the Rosebud Reservation opening and have been used as the rules and regulations in the opening up of the Indian lands for the last two or three years, and which have proven to be not only beneficial to the Indians, but of advantage to the would-be settlers.

Mr. STEPHENS of Texas. And that is the object of the amendment?

Mr. SHERMAN. Yes, sir.

Mr. STEPHENS of Texas. That has been adopted already; that is, the amendment providing that the President shall have the right to adopt these rules and regulations.

Mr. SHERMAN. The section has been passed in the bill, and to that section the gentleman from Utah [Mr. HOWELL] offers this amendment.



Mr. STEPHENS of Texas. Would that be contradicting the amendment already offered providing that the President shall have that right?

Mr. SHERMAN. The gentleman from Utah [Mr. HOWELL] offers that practically as a substitute for the provision that is carried in the bill, and possibly it might have been subject to a point of order had not the whole been subject to the point of order. Certainly, the gentleman from Utah [Mr. HOWELL] having withdrawn his point of order to the provision in the bill which it was conceded was obnoxious to the rule, I could not with grace raise a point of order to his proposition.

Mr. Chairman, I will not take time to read, but will insert in the RECORD some correspondence on this subject.

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DEPARTMENT OF THE INTERIOR,
*Washington, December 10, 1904.*

THE CHAIRMAN OF THE COMMITTEE ON INDIAN AFFAIRS,
*House of Representatives.*

SIR: I have the honor to transmit herewith, for the information of your committee, a copy of a communication addressed by me to the President, under date of November 25, 1904, giving a brief statement regarding the lands of the Uintah Indian Reservation, in Utah, and the present status of the same.

As you will observe, the Department, on February 6, 1904, in view of a report from the Commissioner of the General Land Office as to the probable time required to complete the surveys on this reservation, requested Congress to further extend the time for the opening of the same to public settlement for one year from October 1, 1904. The time, however, was extended by the Congress only until March 10, 1905, as per provision in the Indian appropriation act approved April 21, 1904, and $5,000 was appropriated to enable the Secretary of the Interior to have completed the surveying and allotting as required by the act of May 27, 1902.

The field work on these surveys is reported to be complete, but the office work on the field notes, plats, etc., has not been finished, and none of the surveys have yet been accepted by the General Land Office.

Authority was granted on November 16, 1904, for the acting agent of the Uintah Agency to employ a surveyor and necessary assistants, so as to begin the work of allotting the lands to the Indians, in manner as provided in the act of May 27, 1902, as soon as the surveys shall have been accepted by the General Land Office; but it is quite certain that very little of this work can be done in any event during the winter season, and as the said act requires that the allotments shall be made before the lands are thrown open, it is not believed to be possible to comply with such requirement in time to open the unallotted lands to public entry on March 10, 1905.

In view of the foregoing, I have the honor to submit the matter for the further consideration of your committee, with the request that the time for opening these lands be extended to October 1, 1905, the date suggested in Department letter of February 6, 1904, above referred to.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

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DEPARTMENT OF THE INTERIOR,
*Washington, November 25, 1904.*

The PRESIDENT:

I have the honor to be in receipt from Hon. William Loeb, jr., by your direction, of a request for my views on the subject-matter set out in a communication from Mr. J. H. Ramey, president of the chamber of commerce of Grand Junction, Colo.

Mr. Ramey states that he writes at the urgent request of the board of directors of the aforesaid organization, whose object is the advancement of commercial and in-



dustrial interests of western Colorado and eastern Utah, in regard to the opening of the Uintah Indian Reservation, in the latter section; that it is the consensus of opinion of their people that it is not for the best interests of the whole people that the said reservation should be opened in the manner now proposed, but that, on the contrary, it should be opened somewhat in the manner in which the Rosebud Reservation (in South Dakota) was recently opened—that is, by some equitable plan for drawing lands after registration—and he submits for consideration the question of amendment or change of the present law, which contemplates the opening of the said reservation by simply restoring the surplus lands to the public domain.

In response to your request for my views, I beg to give briefly for your information the following relating to recent legislation upon the said lands and their present status:

The Indian appropriation act approved May 27, 1902, provided for the allotment to the Indians of the reservation of agricultural lands, which can be irrigated, as follows: To each head of a family 80 acres, and to each other members of said tribes (Uintah and White River Utes) 40 acres. These allotments were to be made prior to October 1, 1903, on which date all the unallotted lands within the reservation should be restored to the public domain. The act provided for the protection of the rights of any mineral lease which had been theretofore approved by the Secretary of the Interior, or any permit theretofore issued by direction of the Secretary to negotiate with said Indians for a mineral lease. The act granted the right to any person or company who might have obtained such mineral lease or permit to negotiate, pending such time and up to thirty days before said lands were restored to the public domain, to locate, in lieu of such lease or permit, not to exceed 640 acres of contiguous lands, except the Raven Mining Company, which was authorized to locate 100 mining claims in lieu of its lease.

The Indian appropriation act approved March 3, 1903, extended the time for opening the unallotted lands on said reservation, as provided by the act of May 27, 1902, to October 1, 1904. This was because of the showing made by the Department as to the impossibility of selecting, surveying, and locating the Indians upon irrigable lands within the time limit fixed by the act of 1902.

The work of surveying and marking the irrigable lands needed for allotments to the Indians was begun under the direction of the General Land Office and was pushed as vigorously as the available force and weather conditions would permit; but on February 4, 1904, the Commissioner of the General Land Office, in response to an inquiry of the Department as to the probable time necessary to complete said surveys, reported that "owing to the necessary preliminaries, such as the proposals, awarding and letting of contracts, and preparation of instructions, the surveyors were not ready to take the field until in August last, leaving but a short season for their operations in the elevated region embracing the reservation. I am informally advised that none of the contracting surveyors have completed their field work, and I am of the opinion that the work in the field, the office work on the plats and field notes by the surveyor-general's force, the field inspection, and subsequent office examination here will require the whole of the next surveying season, and that the date for said opening should be postponed at least another year."

In view of this report, Congress was requested, by letter of February 6, 1904, addressed to Senate and House Committees on Indian Affairs, to further extend the date for the opening for one year from October 1, 1904.

The Indian appropriation act approved April 21, 1904, extended the time for the opening of the lands to March 10, 1905, and appropriated $5,000 to enable the Secretary of the Interior to have the surveying and alloting (as provided in the act of May 27, 1902) completed.

The surveys have been completed, but from a report by the Indian Office of November 7, 1904, it appears that none of said surveys have been yet accepted.



On November 16, 1904, authority was granted for Captain Hall, acting agent at Uintah, to employ a surveyor and necessary assistant in order to begin the work of alloting the lands to the Indians, as provided by law, but this authority was granted with the condition that none of these persons be employed and no allotment work be done until he is formally notified of the acceptance by the General Land Office of the surveys.

Regarding the Raven Mining Company, attention may be invited to the correspondence between the Department and the company respecting the company's liability for payment of royalties under its mineral lease on the Uintah Reservation. (This lease was for prospecting for and mining elaterite, asphaltum, woertzelite, gilonsite, and mineral wax, and covered a period of ten years from November 26, 1898, date of approval, and a large tract of land south of the Strawberry River and west of the first guide meridian, within which area 23 mining locations were subsequently approved by the Department.) No royalty has been paid by the company for products mined after December 31, 1902, and the company claims that it is not liable for royalties after September 30, 1903, on the ground that the act of May 27, 1902 had fixed October 1, 1903, as the date for opening the reservation. An opinion was rendered by the Assistant Attorney-General for this Department January 16, 1904, wherein it was held that the company was liable for the payment of such royalties after said date and until the reservation is opened to settlement, thus confirming the position of the Department as expressed in its letter of August 3, 1903, to the company on the subject.

By Department letter of November 5, 1904, the position theretofore taken as to the Raven Mining Company was adhered to, in the following words:

"Upon further careful consideration of the whole matter, and in answer to the questions above noted, you are

advised that, in the opinion of the Department, the Raven Mining Company is liable for payment of royalties after September 30, 1903, as heretofore held in opinion of the Assistant Attorney-General for this Department of January 16, 1904; that notice of increase in rate of royalty does not affect the product mined prior to the expiration of sixty days from such notice, and that formal demand should be made at once upon the company for payment of the amount of royalty found to be due upon all ore mined after April 29, 1904, at the rate of $4.50 per ton, the sixty days' notice provided for having been served on the company February 29, 1904.

"If payment of such royalties is then refused, suit will be brought against the company and the sureties on its bond to enforce payment of the same."

The above letter was amended by Department letter of November 6, 1904, directing the Commissioner of Indian Affairs to also make demand upon the company for royalty due and unpaid from date of last settlement (believed to be December 31, 1902) up to April 29, 1904, at the rate of $3.50 per ton.

In returning the communication of Mr. Ramey, which is herewith transmitted, I have to say that the views expressed therein meet my approval as to the manner of the opening of the reservation. If the lands are simply restored to the public domain, as contemplated by the present law, we will have a repetition of the disgraceful acts and scenes that have occurred at other openings in recent years, whereas if the opening be by registration and drawing, as was done at Rosebud, these may be largely avoided. But Congressional action to this end will be needed, and the same is recommended to your favorable notice.

In the matter of the time fixed by law for the restoration of the surplus lands of the reservation to the public domain (March 10, 1905), I have to state that, in my



opinion, it will be impracticable to do so because of the condition of the surveys of the reservation, which, as stated, have not yet been accepted by the Commissioner of the General Land Office, and because it now seems to be utterly impossible to make by that time the allotments to the Indians of the reservation, as required by the law.

Then there is to be considered the attitude of the Raven Mining Company in its defiance of the Department in its refusal to pay royalties due and claimed under its lease, necessitating suit at law to determine its liability, which is calculated to embarrass the Department in administering the affairs of the reservation. Further legislation by Congress may be required to compel the company to carry out its contracts with the Indians and the Government before the reservation is opened. This matter will be given full and early consideration.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

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DEPARTMENT OF THE INTERIOR,
*Washington, January 4, 1905.*

The CHAIRMAN OF THE COMMITTEE ON INDIAN AFFAIRS,
*House of Representatives.*

SIR: Referring to my letter to your committee under date of the 10th ultimo requesting, for reasons therein stated, that the time for opening the surplus lands of the Uintah Indian Reservation, in Utah, to public entry be extended to October 1, 1905, I have the honor to transmit herewith, for your consideration in connection therewith, a copy of a communication, dated the 24th ultimo, from the Acting Commissioner of Indian Affairs, forwarding a letter from Capt. C. G. Hall, acting agent of the Uintah and Ouray Agency, Utah, of the 14th ultimo, giv-

ing further reasons why the opening of the said reservation should be postponed.

Very respectfully,

E. A. HITCHCOCK,
*Secretary.*

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DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, December 24, 1904.*

The honorable the SECRETARY OF THE INTERIOR.

SIR: Referring to your communication dated November 13, 1904, in which you advised this office that the Department requested Congress under date of the 10th instant to further extend the time for the opening of the lands of the Uintah Reservation, Utah, to public entry until October 1, 1905, I have the honor to transmit herewith a copy, in duplicate, of a communication from Capt. C. G. Hall, acting agent, dated December 14, 1904, giving reasons why the opening of the reservation should be postponed. The copies are transmitted for such disposition as you may be pleased to make.

Very respectfully,

A. C. TONNER,
*Acting Commissioner.*

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DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE,
UINTAH AND OURAY AGENCY,
*White Rocks, Utah, December 14, 1904,*

COMMISSIONER INDIAN AFFAIRS,
*Washington, D. C.*

SIR: I have the honor to call your attention to the existing condition of affairs on the reservation so far as



the Indians will be affected by the existing law to throw the lands open for settlement in March next.

I have hesitated to make any recommendation in regard thereto, hoping that the conditions would so turn out that the opening could be affected without prejudice to the interest of the Indians, and to this end I have kept the date of March 10, 1905, constantly in view as the time set for the opening, so that the Indians might be ready by that time.

However, I am forced to make the following statements which I believe to be of importance relative to their welfare in the future, and feel it important that your Office should be familiar with the facts beforehand, in order that all due consideration might be placed upon the question before its ultimate disposition:

First. The date set for the opening, March 10, 1905, is at a time when the weather on the reservation is liable to be the most extreme. If an opening is affected at that date all Indians who now occupy lands which would not be allotted before the date of the opening would be required to vacate their homes and occupy their allotments in order to give place to the incoming home seekers, and this would [1185] work a very great hardship on many of the Indians, requiring them to change their homes during severe weather, and to occupy lands which have no improvements nor facilities for protection against the inclement weather. For this reason alone I believe the date as above stated for the opening would be most unsatisfactory.

Second. Owing to the nonreceipt of the plats of the recent survey of the reservation, the work of allotting lands has necessarily been deferred until at present the weather is becoming extremely rigid and will in a few weeks be so cold as to render field work almost impossible. This extreme weather may continue until after the date set for the opening, with very few opportunities

for any field work to be carried on. Some few allotments might be made with little field work, but the vast majority would require the actual running of lines. Owing to the peculiar class of soil to be found, many pieces of ground, while appearing to be excellent land from an agricultural standpoint, will, upon examination, be found to have immediately underlying the surface covering of soil a strata of conglomerate which is absolutely impossible to cultivate. To make an allotment on such land as this would be, in my opinion, worse than no allotment at all.

I believe that if the opening were deferred until some time next fall the work of allotting could be promptly and satisfactorily done before that time, giving the Indians an opportunity to occupy their allotments and construct some permanent shelter for the winter months, at the same time giving them an opportunity to build fences and arrange their allotment, or a portion thereof, for cultivation during the ensuing season.

I submit these facts for your consideration, with the endeavor to make clear the appearance of the conditions as they seem to me. It might be possible that from other considerations it would be best to allow the law to remain as it now stands, but I can not see the advantage of it from my standpoint.

Very respectfully,

C. G. HALL,
*Captain, Fifth Cavalry, Acting U. S. Indian Agent.*

Mr. STEPHENS of Texas. I am not disposed to raise any point of order, but I would like to say that it might not be the best thing to be done possibly.

Mr. HOWELL of Utah. The chairman of the Committee on Indian Affairs is well aware that the act of 1902 provides that homesteaders may acquire land which is in the public domain. By that act it is provided that



they shall pay a dollar and twenty-five cents per acre for the public domain.

Mr. SHERMAN. The gentleman says it is so, and I have no doubt he is correct.

Mr. HOWELL of Utah. Therefore I can not understand why there should be any loss to the Indians by this.

Mr. SHERMAN. The provision as it is in the bill was drawn after careful consideration by the committee, and agreed to in the committee without division. I think this provision which is suggested or proposed by the substitute should not prevail.

Mr. HOGG. I would like to suggest to the gentleman from New York, while on the subject of fixing September 1 instead of October 1, that there are very great reasons why it ought to be a little earlier. The early snows make it almost impossible for the people to make these settlements unless the time is made a little bit earlier. I would be very willing to support an amendment of that kind.

Mr. SHERMAN. Well, I do not object to having it modified, and yet in my judgment, Mr. Chairman, the land will in fact be opened prior to September under the terms of this bill. I would not strenuously oppose that modification of thirty days in the date, fixing the date at September 1 rather than October 1.

Mr. HOGG. Do you agree to the amendment?

Mr. SHERMAN. I do not oppose it.

Mr. HOGG. Then I move, on line 17, page 28, that the word "October" be stricken out and "September" inserted in lieu thereof.

The Clerk read as follows:

> Page 28, line 17, strike out "October" and insert "September;" so as to read "September 1, 1905."

The question was taken, and the amendment was agreed to.

The CHAIRMAN. The question is on agreeing to the substitute proposed by the gentleman from Utah.

The question was taken, and the substitute was rejected.

Mr. GILBERT. Mr. Chairman, I offer the amendment which I send to the desk.

The Clerk read as follows:

Insert in lieu of the paragraph:

"That the homestead settlers on the lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, S. Dak., opened under an act entitled 'An act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provision to carry the same into effect,' approved April 23, 1904, be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened and filed upon until the 1st day of May, A. D. 1905: *Provided, however,* That this act shall in no manner affect the regularity or validity of such filings, or any of them so made by the said settlers on the lands aforesaid; and it is only intended hereby to extend the time for the establishment of such residence as herein provided, and the provisions of said act are in no other manner to be affected or modified."

Mr. SHERMAN. Mr. Chairman, I raise the point of order against the amendment. It changes existing law.

The CHAIRMAN. The gentleman from New York makes the point of order against the amendment. The Chair will hear the gentleman from Kentucky.

Mr. GILBERT. Well, Mr. Chairman, I expect the point of order is well taken, and I do not want to discuss that; but I want to put myself on record as being anxious to extend the time. The six months' limit expires in dead winter, and the amendment can serve no possible purpose except to release these homesteaders from going up there and taking possession in midwinter. It can do no possible



harm to anybody or to the public interest to have that time extended until then, and for that purpose the amendment is offered.

The CHAIRMAN. The point of order is sustained.

Mr. FITZGERALD. I offer the following amendment.

The Clerk read as follows:

Insert at the end of the paragraph:

"*Provided,* That nothing herein contained shall be construed to extend beyond the time fixed by law the time within which any person or persons to locate 640 acres of contiguous mineral lands in lieu of rights in mineral leases as provided under the act of May 27, 1902."

Mr. SHERMAN. Mr. Chairman, I raise the point of order, if one lies against that; I do not know that it does.

Mr. FITZGERALD. Under the act of May 27, 1902, certain persons who had mineral leases or claimed to have them under the provision included for mineral leases were given the right to select within the thirty-days limit fixed for the restoration of these lands to the public domain to locate 640 acres of contiguous mineral lands, and to take them in lieu of all rights under their lease. Now, by the extension of the time fixed for the restoration of this reservation to the public domain their time has been extended until within thirty days of March 10, 1905. It seems to me that whatever rights these persons may have had have been amply protected, and they should not be allowed to continue to prospect on that reservation and to secure preferential rights away beyond what it is ever intended they should be given, to the detriment of all other persons desiring to enter on the mineral lands.

Mr. SHERMAN. I am inclined to think the gentleman in that statement is absolutely correct; but I understand that there is litigation pending now, referred to by some gentleman on the floor here, by one of these com-

panies that had a lease under which a royalty was payable, which it has refused to pay, and a suit has been instituted, as I understand, on the part of the Government to force payment of the royalty. Now, has the gentleman considered how such a provision might affect that suit?

Mr. FITZGERALD. No; I will just call the attention of the chairman of the committee to the language of the original act:

That nothing——

Mr. SHERMAN. I remember that language.

Mr. FITZGERALD. That simply compels those who have the right to locate under the law as it exists at present to make their locations within the time now fixed by law and prevents the extension of the time under the provisions of this amendment.

Mr. SHERMAN. I think you are right as far as the extension is concerned. My only thought was whether any such provision as that might in any way affect pending litigation. They are claiming now, as I understand it, one or the other of these companies, or perhaps both, that their rights vested a year or so ago absolutely, and that because they were not put in possession of what they were given under that act of 1902 therefore they were not called upon to pay any royalties.

Mr. FITZGERALD. I do not believe it would affect any litigation, but I will suggest that a clause be put in to that effect. My purpose is to end the time within which——

Mr. SHERMAN. I am in sympathy with the purpose of the amendment, and I withdraw the point of order.

The CHAIRMAN. The point of order is withdrawn. The question is on agreeing to the amendment proposed by the gentleman from New York.

The amendment was agreed to.



Mr. HOWELL of Utah. I offer the following amendment to be inserted after the word "abridged," in line 8, page 39:

Mr. SHERMAN. To be inserted after the words of the amendment just adopted.

The Clerk read as follows:

> Insert, after the amendment just adopted, the following:
>
> "*And further provided,* That for one year immediately following the restoration of said lands to the public domain, said lands shall be subject to entry only under the homestead, town site, and mining laws of the United States."

Mr. SHERMAN. We have already provided in this amendment that they shall be opened under regulations prescribed by the President, under a proclamation in which he can cover everything. I think we ought not to adopt that amendment.

[1186] Mr. HOWELL of Utah. It seems to me that the amendment is of great importance, for the reason that it limits the choicest lands on that reservation to entry and location by actual home seekers and home builders, and restricts those who might desire to acquire title to land there under any other of the land laws of the United States at least for one year after the opening of the reservation. In my opinion this right should be reserved to actual homesteaders until the better and choicer lands in the reservation have been occupied and settled upon, and it seems to me, Mr. Chairman, that this amendment is obviously an important one and ought to be adopted. It is in line with the general sentiment of the country that our public lands should be reserved for actual home makers. I therefore hope that the amendment will prevail. It can not possibly work any hardship upon the Indians, because in the act providing for the opening of this reservation it is stipulated that homesteaders shall pay $1.25 per acre for the lands homesteaded.

The CHAIRMAN. The question is on agreeing to the amendment proposed by the gentleman from Utah.

The question being taken, on a division there were—ayes 10, noes 25.

Accordingly, the amendment was rejected.

* * * *

CONGRESSIONAL RECORD—SENATE

FEBRUARY 27

[3522] The next amendment was, on page 61, after line 5, to strike out:

> That the time for opening the unallotted lands to public entry on the Uintah Reservation in Utah, as provided by the acts of May 27, 1902, and March 3, 1903, and April 21, 1904, be, and the same is hereby, extended to September 1, 1905, unless the President shall determine that the same may be opened at an earlier date: *Provided*, That so much of said lands as will be under the provisions of said acts restored to the public domain shall be open to settlement and entry by proclamation of the President of the United States, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons intending to make entry thereon, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars or Philippine insurrection, as defined and described in sections 2304 and 2305 of the Revised Statutes, as amended by the act of March 1, 1901, shall not be abridged: *Provided*, That nothing herein contained shall be construed to



> extend beyond the time fixed by existing law the time within which any person or persons to locate 640 acres of contiguous mineral lands in lieu of rights under mineral leases as provided in the act of May 27, 1902.

The amendment was agreed to.

The next amendment was, on page 62, after line 9, to insert:

> That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the 10th day of March, 1905, it is hereby provided that the time for opening said reservation shall be extended to the 1st of September, 1905, and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish war or Philippine insurrection, as defined and described in sections 2304 and 2305 of the Revised Statutes, as amended by the act of March 1, 1901, shall not be abridged: *And provided further*, That all lands opened to settlement and entry under this act remaining undisposed of at the expiration

of five years from the taking effect of this act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than 640 acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the act of Congress of May 27, 1902, and the acts amendatory thereof and supplemental thereto.

The amendment was agreed to.

The next amendment was, on page 63, after line 18, to insert:

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided*, That the proceeds from any timber on such addition as may with safety be sold prior to June 30, 1920, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.

The amendment was agreed to.

* * * *

[3751] INDIAN APPROPRIATION BILL

The PRESIDENT pro tempore laid before the Senate the action of the House of Representatives disagreeing to the amendments of the Senate to the bill (H.R. 17474) making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1906, and for other purposes, and requesting a conference with the Senate on the disagreeing votes of the two Houses thereon.



Mr. STEWART. I move that the Senate insist upon its amendments and agree to the request for a conference.

The motion was agreed to.

By unanimous consent, the President pro tempore was authorized to appoint the conferees on the part of the Senate; and Mr. STEWART, Mr. MCCUMBER, and Mr. DUBOIS were appointed.

* * * *

CONGRESSIONAL RECORD—HOUSE

MARCH 1

[3786] INDIAN APPROPRIATION BILL

The SPEAKER pro tempore laid before the House the bill (H. R. 17474) making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1906, with Senate amendments thereto.

Mr. CURTIS. Mr. Speaker, I ask unanimous consent that the House disagree to the amendments of the Senate, and ask for a conference thereon.

The SPEAKER pro tempore. Is there objection?

Mr. WILLIAMS of Mississippi. Mr. Speaker, I understand that the statehood bill has been put as an amendment on to this bill?

Mr. CURTIS. No; and I will say to the gentleman from Mississippi [Mr. WILLIAMS] that no important amendment will be agreed to by the House conferees until after it has been agreed to by the House.

Mr. WILLIAMS of Mississippi. Very well; that is all right.

Mr. ROBINSON of Indiana. Mr. Speaker, reserving the right to object, I desire to state that the gentleman

from Minnesota [Mr. LIND], who is not present, desires to object, and until he returns I will have to interpose objections.

The SPEAKER pro tempore. Objection is made. The committee will resume its session.

* * * *

[3791] INDIAN APPROPRIATION BILL

Mr. SHERMAN. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill H. R. 17474, the Indian appropriation bill, and that the two amendments of the Senate [3792] thereto be disagreed to, and that we ask the Senate for a conference thereon.

The SPEAKER. The gentleman from New York asks unanimous consent to take from the Speaker's table the Indian App. bill and disagree to the Senate amendments and ask for a conference. Is there objection? [After a pause.] The Chair hears none, and it is so ordered.

The SPEAKER announced the following conferees on the part of the House: Mr. SHERMAN, Mr. CURTIS, and Mr. STEPHENS of Texas.

* * * *

CONGRESSIONAL RECORD—SENATE

MARCH 2

[3866] INDIAN APPROPRIATION BILL

Mr. STEWART submitted the following report:

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 17474) "making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30th, 1906, and for other purposes," having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows:



That the Senate recede from its amendments numbered 1, 9, 11, 14, 15, 16, 17, 19, 21, 23, 24, 28, 34, 35, 38, 42, 43, 46, 47, 50, 51, 53, 55, 56, 57, 58, 59, 60, 61, 62, 64, 69, 91, 95, 96, 102, 104, 107, 108, 113, 119, 120, 124, 125, 133, 136, 138, 139, 142, 144, 145, 149, 150 and 153.

That the House recede from its disagreement to the amendments of the Senate numbered 2, 4, 5, 6, 8, 10, 13, 18, 22, 25, 26, 27, 36, 41, 44, 45, 48, 54, 63, 65, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 101, 103, 105, 106, 110, 112, 121, 122, 123, 126, 127, 128, 129, 130, 131, 132, 134, 136, 137, 141, 146, 151, 152; and agree to the same.

* * * *

[3868] Amendment numbered 93: That the House recede from its disagreement to the amendment of the Senate numbered 93, and agree to the same with an amendment, as follows: In line 6 of said amendment, after the word "five" insert the words: "unless the President shall determine that the same may be opened at an earlier date"; and the Senate agree to the same.

Amendment numbered 94: That the House recede from its disagreement to the amendment of the Senate numbered 94, and agree to the same with an amendment, as follows: At the end of said amendment add the following:

"That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in the office of the Secretary of the Interior, in the city of Washington, said description and a map showing the locations made by it on the Uintah Reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two (Statutes at Large, volume thirty-two, page two hundred and sixty-three); and thereupon the Secretary of

the Interior shall forthwith cause said locations to be inspected and report made and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each of said claims: *Provided further,* That the Florence Mining Company entitled under the act of Congress approved May twenty-seventh, nineten hundred and two, to the preferential right to locate not to exceed six hundred and forty acres of contiguous mineral land in the Uintah Reservation, Utah, shall within sixty days from the passage of this Act file in the office of the recorder of deeds of the county in which its location is made a proper description of its claim, and it shall within the same time file in the office of the Secretary of the Interior said description and a map showing the location made by it on the Uintah Reservation, Utah, and thereupon the Secretary of the Interior shall forthwith cause said location to be inspected and report thereon made, and if found not to exceed six hundred and forty acres he shall issue a patent in fee to said Company for the said land: *And provided further,* That the extension of time for opening the unallotted lands to public entry herein granted shall not extend the time to make locations to any person or company heretofore given a preferential right, but the Raven Mining Company and the Florence Mining Company pending the time for opening to public entry the Uintah Reservation shall have the right of ingress and egress to and from their respective properties over and through said reservation."

* * * *

CONGRESSIONAL RECORD—HOUSE

[3917] Amendment numbered 93: That the House recede from its disagreement to the amendment of the Senate numbered 93, and agree to the same with an



amendment, as follows: In line 6 of said amendment, after the word "five" insert the words: "unless the President shall determine that the same may be opened at an earlier date"; and the Senate agree to the same.

Amendment numbered 94: That the House recede from its disagreement to the amendment of the Senate numbered 94, and agree to the same with an amendment, as follows: At the end of said amendment add the following:

"That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in the office of the Secretary of the Interior, in the city of Washington, said description and a map showing the locations made by it on the Uintah Reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two (Statutes at Large, volume thirty-two, page two hundred and sixty-three); and thereupon the Secretary of the Interior shall forthwith cause said locations to be inspected and report made and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each of said claims: *Provided further,* That the Florence Mining Company entitled under the act of Congress approved May twenty-seventh, nineteen hundred and two, to the preferential right to locate not to exceed six hundred and forty acres of contiguous mineral land in the Uintah Reservation, Utah, shall within sixty days from the passage of this Act file in the office of the recorder of deeds of the county in which its location is made a proper description of its claim, and it shall within the same time file in the office of the Secretary of the Interior said description and a map showing the location made by it on the Uintah

Reservation, Utah, and thereupon the Secretary of the Interior shall forthwith cause said location to be inspected and report thereon made, and if found not to exceed six hundred and forty acres he shall issue a patent in fee to said Company for the said land: *And provided further,* That the extension of time for opening the unallotted lands to public entry herein granted shall not extend the time to make locations to any person or company heretofore given a preferential right, but the Raven Mining Company and the Florence Mining Company pending the time for opening to public entry the Uintah Reservation shall have the right of ingress and egress to and from their respective properties over and through said reservation."

And the Senate agree to the same.

* * * *



**Proclamation of September 1, 1906, 34 Stat. (LD 132)**

[3228] September 1, 1906

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS, the Secretary of the Interior, on July 11, 1905, under the authority of the act of June 19, 1902 (32 Stats., 744) amended by the act of March 3, 1903 (32 Stats., 982, 998), and March 3, 1905 (33 Stats., 1048, 1069), reserved certain lands in the former Uintah Indian Reservation in Utah, including Lots 2 and 13 in Sec. 10, T. 2 S., R. 1 E., containing 8.80 acres, for the Uintah Indian Grazing Reserve; and whereas, the President of the United States in his proclamation of July 14, 1905, opening the lands in the said Uintah Reservation to settlement and entry, excepted from such opening the lands included in said grazing reserve; and whereas one David Eskelson was, on September 26, 1905, erroneously allowed to include in his [3229] homestead entry No. 806, the said Lots 2 and 13, on which lots he has placed valuable improvements, and which, by virtue of their small area and being entirely segregated from the balance of the grazing reserve by the claims of the Raven Mining Company, are of no value as a part of said reserve:

Now, therefore, I, THEODORE ROOSEVELT, President of the United States, by virtue of the power in me vested, do hereby declare and make known that the lots numbered 2 and 13 of Section 10, Township 2 S., of Rage 1 E., Uintah Special Meridian, in Utah, are hereby restored to the public domain.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, the 1st day of September in the year of our Lord, one thousand nine hun-

dred and six, and of the Independence of the United States the one hundred and thirty-first.

[SEAL] THEODORE ROOSEVELT

By the President:
ALVEY A. ADEE
*Acting Secretary of State.*



**Minutes of Council Meetings between Inspector James McLaughlin and Ute Indians (May 18-23, 190[illegible]) (JX 162)**

Minutes of Council held at Uinta Agency, Whiterocks, Utah, by James McLaughlin, United States Indian Inspector, with the Uinta and White River Ute Indians belonging on the Uinta Reservation, Utah, for discussion and consideration of the provisions of the Act of May 27, 1902, affecting said Indians, and as amended by the Indian Appropriation Act approved March 3, 1903.

Council convened Monday, May 18, 1903, at 2 o'clock p.m. with 127 Indians present and in attendance. Henry Harris, Happy Jack, Henry Jim, and Willie Duncan, Interpretors. John F. MacKey, Stenographer.

Capt. W. A. Mercer, Acting U.S. Indian Agent:

My Friends, Last winter, Congress passed a law which affects your interests. This law, the Secretary is compelled to carry out, and one of the things he is obliged to do is to send an Inspector to you to get your vote on the question of allotments. He has selected for that purpose one of his best men, and one who has had many years experience among the Indians as an Agent and as an Inspector, and who understands the needs of the Indians as well as any man in the country, and above all, is a friend of the Indian race. He has given to your interests much hard study that he may advise you right. I have known him for many years, and he is a good man for the Indian. I want you to understand that the Secretary and the Commissioner are your friends in this matter as well as all others, and want to do the best they can for you, but all the Secretary can do now is to send to you a man who will explain to you all about the law, and who has a straight tongue, so that what he tells you, you can believe, and what he advises you to do, you can depend upon as the best for your interests and the welfare of your people now and in the future. I want you

to listen to him, to ask him all the questions you wish, and then when he has said all he has to say, to get together here or in your camps and to talk over among yourselves all you have heard, and tomorrow, or when you have made up your minds what to do, come together here again and let him know how you feel about the law, and to be ready then to vote on the question of allotments. What you say will be taken down and sent to the Secretary to read. The Inspector will now talk to you. He comes direct from your friend the Secretary. His name is Inspector McLaughlin and most of you have met him before.

Inspector McLaughlin:

My Friends, I am pleased to see such a large representative gathering, and I shake hands with each and every one of you here assembled.

I have been sent here by the Secretary of the Interior to submit to you for your consideration and decision, the provisions of the act of Congress of May 27, 1902 and the amendments thereto as contained in a provision of the Indian Appropriation Act approved March 3, 1903, which provisions are with reference to the lands of your reservation and involve your interests.

The proposition which I am going to place before you is one of great importance to you people. and I trust that you will consider it carefully and decide the question wisely. I shall endeavor to explain every feature of the enactment involving your interests, and which is now a law, that you may understand it very clearly.

Having visited your Agency two years ago, we are not entire strangers to each other, and it is my hope that our councils be conducted in a spirit of friendliness. We meet here as friends and should discuss all questions coming before this council in a friendly manner, so that whether you consent to the provisions of said acts of Congress or not, we will part as friends.

I will now read the provisions of the Acts of Congress referred to and after reading them through, will then go



back to the beginning and explain them sentence by sentence. (Reads the Act)

Now, my friends, I wish to explain this matter very carefully. I have just read the Act to you and want you to ask me any questions in reference to it you may desire so that you will be brought to understand every phase of the law.

I want you to understand that no official of the Department is responsible for this legislation. Congress makes the laws and we all have to obey them, and it therefore becomes the Secretary's duty to carry out this law.

Until quite recently, the policy of our Government has been that Indians had unquestioned right to all lands of their respective reservations, but a recent decision of the Supreme Court of the United States is that Indians have no right to any part of their reservations except what they may require for allotments in in severalty or can make proper use of.

This was the decision of the Supreme Court on January 5th last in the case of a Kiowa Indian of Oklahoma named Lone Wolf, which involved the question of the Indian's title to lands. The court decided that the Government had the right to legislate in regard to the surplus lands of Indians without consulting the Indians concerned. But if they take allotments, they cannot be disturbed,—their title to the lands allotted to them being secured to them by law. By that decision of the Supreme Court, Congress has the legal right to legislate in regard to Indian lands, and Congress has enacted a law which requires you to take your allotments. The Secretary of the Interior and the Commissioner of Indian Affairs are very anxious that you consent to the provisions of this Act so that you may get the best of your reservation lands for yourselves. The Secretary of the Interior and the Commissioner of Indian Affairs do not wish to impose any hardship on you people, and having your best interests at heart, wish you to take the best lands for yourselves and children. The question is a very important one

to you. If in my power, I would endeavor to get easier conditions for you, but I have no discretion in the matter and the law must be complied with.

After you have taken your allotments the remaining land is to be opened for settlement, and every person who takes any of this remaining land must file upon it under the homestead law and pay $1.25 per acre for it, and the proceeds will be for your benefit. The expenses of alloting your lands will be charged to that fund, and the remainder will be expended for the benefit of the Uinta and White River Utes in the discretion of the Secretary.

I do not know, my friends, that I can make this any plainer. The interpreters may not be able to understand fully, but they are doing the best they can, and I want you to consider this very carefully. I am here for this business only, and I hope you will take time and consider it very carefully. I hope to have some other interpreters here tomorrow and perhaps you may be able to understand them better. I have been thirty two years with the Indians. I know nearly all the Indians in the country and have visited nearly every tribe in the United States. They know that I tell them the truth and I am never ashamed to return to a tribe and look them in the face. In talking with Indians, I have but one tongue. Any question you ask me, I will answer truthfully. I do not believe in giving honied words to people that will deceive them and lead to disappointment. I am here to obtain the consent of you people to accept allotments as specified by the law, 80 acres to every head of a family and 40 to each other member, and 250,000 acres pasture land south of Strawberry River for use of your cattle and horses, and the remaining land, after the 1st of October 1904, to be opened for settlement to homesteaders who must pay $1.25 per acre.

My friends, if I had my choice in this matter I would be glad to see you occupy all of this country but this is impossible. The White People are coming into the country and no power can keep them out. The only land the



Indian is sure of is that which he takes as his allotment. By accepting allotments you have the choice of the very best land, and the coming of White Men to take the land near yours will enhance the value of your land: the land you take will be more valuable on this account. As a friend to the Indian and a friend to you people, I would advise you to accept the provisions of this Act. The land will soon be surveyed, bids for same being already invited by advertisements, though it will not be entered upon right away. I want you to take time to consider what is best for you to do.

My friends, this is a matter that you may not understand fully to day, and I do not expect it. I would rather wait till tomorrow morning that you may ask me any questions you desire made clear to you. I have now placed before you the Act of Congress to let you know the nature of my business here at the present time. I hope you will consider well what I have said, and if you do not understand, I want you to ask me any questiaons you wish. Here is a gentleman who is taking down every word I say and every word you may say will be recorded by him, and I will leave a copy of all our talk here with your Agent. The other copy will be sent by me to the Secretary, and the Secretary will read all we say. If any of you should forget what I say you can call at the Agent's office and the Agent can show you the copy he will have there.

I do not want to say too much to day so that you might forget or get mixed. so I think we had better adjourn till tomorrow at ten o'clock, and I hope you will be able to tell me then what you think of the proposition. I want you to stay here at the Agency and your Agent will furnish you with something to eat. You should not go home for two or three days yet, but come in here every day to talk with me. As I said in the beginning, this is a matter of great importance and I hope you will be patient. If you wish to ask any questions I will listen to them, or if you wish to talk together first I am ready to comply with your wish.

Tim Johnson:

We would like to meet some place, and we want to all talk together next Sunday.

Inspector McLaughlin:

That is too long to wait. I dont want to hurry you and I want to explain everything fully as questions may arise, and you should stay here so that I can explain everything you do not understand clearly, then you can go where you choose and council as much as you wish.

Tim Johnson:

There are more Indians than we have here now and we want to see them about it.

Inspector McLaughlin:

I must send in my report by June 1st, in twelve days from now. It is too long to wait a week for our next meeting. I Will not hurry you, but we ought to get through this business by next Sunday. You ought to stay here so that you can ask me questions and understand the matter fully. The Department has authorized your Agent to give you rations. This is always done on such occasions. Other Indians will be coming in and you had better all stay here so that as many as possible may be here to talk to me, and also, among yourselves here about this matter. All you Indians ought to be together here to talk it over and consider it. That is the best way.

Wanrodes:

We don't want to hurry. Some Indians are not here. May be one week before all will be here. We want all Indians here.

Inspector McLaughlin:

I believe that it will take a week, and I want you to take all the time you need. I am very much pleased to see such a large gathering at this first council.

The council adjourned at 4-30 p.m.



Council reconvened at 2 p.m. Tuesday the 19th, with about 120 Indians in attendance. John Reed interpreting.

Inspector McLaughlin.

My friends, we have met again and I am very glad to see so many of you assembled here to day. I explained the object of my visit here very carefully yesterday, and I hope that you all understand it fully. If there is anything that you do not understand clearly, I wish you to ask questions so that I can explain it to you.

As I said yesterday, this is a very important matter that is presented for your decision, and I hope that you will use care and good judgement in deciding upon it. This is a matter that is of greatest importance for your future welfare and is one that you should consider without prejudice. While it is your duty to consult and talk this matter over among yourselves, you should not listen to the advice of persons who are prejudiced against your best interests. I am here to present this matter to you and answer all questions you may ask me and I am now ready to hear what you may have to say.

Tim Johnson (White River Ute)

You are here now to ask these Indians a question. What do you want to ask about? We hav'nt got a whole lot of things to talk about with you. This land is ours and we hav'nt got it for sale. The Indians say that they want to keep it and hold it if they can. When they put us on the reservation, it means the President told us to hold this reservation and they were not to open it. He said "I put you on that land, and I want you to stay on it." This whole land used to belong to the Indians at one time.

That is the reason I talk so. He is not going to break this reservation and settle anyone upon it. I was born here on this land and we do not want to give it up.

All the Indians all over the country listen to what Washington talks about, and that is the reason they do

not want to get into any trouble like that. People say that they are friends of the Indians and they think they can keep on talking to us all the time. That's the reason you ought not to come asking them about their land here. The president made this reservation here for the Indians and it ought not to be opened up. The reason they want it is on account of these mines. They got mines on the reservation. The Indians think that is why they want it and that is why the Indians do not want it ever allotted. They made this treaty a long time ago. This mining right some Whites got over here and the Indians signed it. That is all right. (Places document on the table) We had a talk here and the Whites and Indians had to be heard.

Inspector McLaughlin:

I wish to speak to you people in reply to my friend Tim Johnson. My friends, I explained this matter to you yesterday so carefully that I thought you all understood it. I explained yesterday to you people that this was not a matter for even the Secretary or Commissioner to pass upon. It is already an act of Congress. Now my friends, Tim Johnson has raised a question that I am very glad to have brought up. He says there was a large tract of country set apart for you people, that you were to have for your selves for all time. Now my friends, you are only one tribe of a great many tribes of Indians in the United States. Your reservation is only one of a great many similar reservations that are scattered over this country. When the Whites discovered this country they first began settling on the Atlantic coast and gradually moved westward, pressing farther and farther west. Then people began coming eastward from the Pacific coast until the advance guards of the white settlements met and there is now no frontier. When there was a great deal of vacant land, there were large tracts set apart for the Indians. The reservations were made large in days gone by when you could make a living by hunting and large reservations were then necessary and possible, but with



the tide of immigration coming into the country, game has become scarce and you can no longer live by hunting: and therefore you must take to agriculture to make a living for yourselves and families. As I told you yesterday, the decision of the Supreme Court is the highest authority in this land, and the Supreme Court has decided that the sovereign right of ownership of land is in the Government and the Indian is entitled to only what land he can make use of. Now my friends, there is no other government on this globe that has been so generous with a conquered people as our Government has been. It gave the people found inhabiting this country large tracts of land to live on till they reached a fair degree of civilization. Now my friends, remember that the President, the Secretary, and the Commissioner are only executive officers. They are to execute the laws made by Congress. I wish to explain to you what Congress is. Congress is the representation of the people of the United States. The people elect the members of Congress, and they make the laws. Congress is the voice of the people speaking through their representatives. Congressmen are elected every two years. Every citizen of the United States is a voter and has a voice in saying who will be his representative and as soon as you people have your allotments, you will have a voice in saying who will be your representatives in Congress. Now, Congress has enacted a law affecting you people. It says you are to have lands allotted to you and I have been sent out here to explain the Act and obtain your consent to accept your allotments. My friends, I want you to understand distinctly that I am not here of my own accord. I have been sent here by the Secretary of the Interior to place before you the act of Congress of which I have been speaking to you.

The Secretary under the law, is required to carry this into effect. He was obliged to send myself or some other Inspector to see you people and talk to you about it. I am to ask you to accept allotments of 80 acres for each

head of a family of irrigable land, that is land that can be watered, and 40 acres to each other member of the family. If the consent of you people cannot be obtained by June 1st, that is in eleven days from now, the Secretary must proceed to allot the lands to you under the Act, all the remaining land after the allotments are made, to be opened for settlement, the title to be acquired by homesteaders under the homestead Act, the price to be paid by the homesteaders of $1.25 per acre. Now my firiends, I want you to understand that this is not the action of the Secretary or the Commissioner. It is the Act of Congress. Congress does not intend to have large tracts of land held by Indians in future of which they make no use. But they do not desire or intend to take this land from Indians without compensating them for it. Under the late decision of the Supreme Court, which is the interpreter of all the laws, Congress has the power to enact such legislation. I want you to understand, my friends, that I am known among the Indians for telling the truth. I will answer all your questions truthfully. I will not misrepresent anything nor use misleading words. And I say to you as your friend, that the law must be complied with and will be carried out. My friend, Tim Johnson, has a wrong idea regarding this matter and I want to correct it before it is accepted and believed by you Indians. The policy of the Government in regard to Indian reservations has changed during the past year. There will be no more treaties made with Indians. The surplus lands will be opened to settlement but the Indians will be protected in their homes. This question, my friends, may be somewhat cloudy and I expect you to ask questions and I hope you will ask them in a friendly way. All of your reservation, outside of your allotments, and the tract set apart for pasture, will be opened for settlement upon which Whites will come, and the proceeds will be placed in the United States Treasury to your credit and expended for your benefit in the discretion of the Secretary of the Interior.



Capt. Joe:

I want to talk just a little bit to you. The Indian reservation was not put down for nothing. It is held down by something heavy. A soldier man, like our Agent here, put this reservaton here. He was a general of the army who talked with us and put this reservation aside for us and said it was put aside for the Indians: and the Indians were put upon it. He told Brigan Young and his Mormons that he did not want them to come here,—that this reservation was for the Indians. He said that to Soveyet and to another chief, old Tabby, and another one, old Antero. They are all dead and gone now, I am the only one here that heard that treaty. My friend, you are a good man, but I don't want you to talk to us about opening our reservation. I want to hold our reservation and keep it for ever from the White people. We want to keep White people off the reservation. This is the Indian's land. There is only one land here and that is the Indian's land and it belongs to the Indians. This reservation here was put aside for the Indians, and here now, is a school house for the children to be educated in. This reservation was not put here for nothing. It was put here by a chief from Washington. It was not for nothing that he was sent here to make this reservation, and he was a war chief. For some time past it was not good here,—but since this new Agent came, I feel happy and my heart is good. It was not good when Myton was Agent here. Myton let the White men come here, and I think it was Myton who let the sheep men lease the reservation. You are our friend. You come to bring us news and we want you to let it end now. We dont want to listen to that kind of talk. We don't want this reservation opened, and we do not want White people coming in among us. Before we had this new Agent, they had a talk like this and I am the only one left that talked that time. Here are the Uncompaghre Indians here and the White River Indians, and the Uinta Indians and we want to hold our reservaton. There is a line from here on to top of those moun-

tains where the Indians living on the reservation can go any place, and that is good. We have these mountains, and streams and don't want anybody coming on this reservation. That's why I have talked here, and that's all I am going to say now.

Succioff:

This land is ours; it is not for nothing; this is where our children were born and raised. That is the reason we do not want this reservation thrown open. We do not want anybody cutting it off. Is there anybody here who has made the land? Who is it? Let him come here and talk. We are not going to give up any of this reservation away, nor have it cut in little pieces. It is ours, and we are going to keep it. We know our reservation line, and the White Man knows it.

Appah, (White River Ute)

You are my friend. What have you been telling these Indians? I do not like that. When the Indians were given this land and when they pulled the chain over and surveyed it, they told us that this land would be ours always and that it would never be opened. That is the reason we do not know anything about opening our reservation. The Indians have lots of horses, and when you tell us that we must take farms, we do not like that on account of our horses. I have a father in Washington. It is on account of this reservation that I have that father. That is the reason the Indians think of their father in Washington upon whom they depend for these things. We do not listen to any White Man out here. We do not listen to the Mormons here. That is the reason I do not like what you tell us.

Sowsonocutt, (White River Ute)

They did not put us here on this reservation for nothing. They put us here a long time ago. That is how we came on this reservation. That's the reason we like this



land here and we are holding it tight. All this land belongs to us and this reservation here belongs to the little children growing up We do not like what you tell us when you talk about giving us little pieces of land. It is not good. The Indians have lots of cattle and horses. When we take the Government's little pieces of land, how are we to run our horses inside on little pieces of land?

When I was in Washington, I saw my father, and he told me he would never put us out of this reservation. The Commissioner told me:— "When anybody comes to ask for your reservation, do not listen to him." "Don't let anyone who talks like that come into your house." There is just one resrvation left,—the reservation here: that is our land. That's all.

Tercas:, (White River Ute)

I did not grow up here for nothing. This land here belongs to me. I do not want to sell any of it off.

Capt. Parank (Uinta)

I do not want you to steal my money. I heard all you had to say. I Heard you, and I think I understand you all right, but I do not believe what you tell me. I do not like it when you talk to me. This land I am talking on, I have grown up upon. Long time ago, I did not talk any, but now I talk. I have a father, Washington, I call him. He has me for his boy on account of this land. I am an Indian, I think of what they told us long time ago, when they gave us this reservation. I do not know anything about selling timber. I do not know anything about selling minerals on the reservation. This land here belongs to the Indians. They were put on it a long time ago. If Washington has put his name down on this paper for opening the reservation, I am not going to listen to it. I am telling you now the truth. That is the reason I keep thinking about Washington all the time even if you are here talking to me.

Game, (Uinta)

I see you and you see me. You travel all over the country. You are here now to look at this Indian reservation. Now, I am going to talk about our reservation and we are not going to talk about it for fun. We are just going to talk about one thing. We have one country, one land. That is the reservation and we do not want it opened up. We want to hold our own reservation here just as it now is. There are people on this reservation who own it. We are not going to talk about opening our reservation. We were born here on this reservation. We will hold the country here around. We like this reservation here and we want to keep it. We do not know anything about selling it. Here is where the children are growing up. We do not want to give any of the water away or let any of it go.

Capt. Woods, (Uinta)

I like this reservation, this land. I hold on to it tight. I do not want to let it go. This land here don't belong to the people back there who make the law: it belongs to these people who have black hands. They do not want to see this reservation opened. We like this reservation here, and we want to keep it. We do not want to give any of the water away or let any of it go.

Wapsock, (Uinta)

We do not want this reservation line changed in any way. We want to keep it now just as it is; that's the way the other reservations are. All the other reservations belong to Indians, and that's how the Indians are on this reservation. That's the reason we have an Agent here to watch it for us. All other land is same as here and they raise their children on it. They are talking back there, and you come and tell what they are talking about. These people here are talking to you now and tell you that we do not want to have the reservation thrown open. We



have an Agent here to watch it. The Indians do not understand anything about being put on a little farm. Even if they talk about that in Washington, we do not like it. They tell you to come here and talk to us and let us talk about it. Now we do not like that even if they are our friends. We have a school house and our children are going to school. They were born on this reservation and it belongs to them.

Little Jim (White River Ute)

It is all right that we are talking here. Our Agent is listening to what we say. You are here telling us our business, and that is good too. You are telling about what they are talking in Washington and that is good. I do not say that you are telling this yourself. Even if they do say in Washington, that our reservation is to be thrown open I do not like it. I do not blame the Indians for wanting to hold their reservation. They raised their children here and they want to keep it. That is the reason the Indians do not want to sell it. Our land here is just as if fenced around with iron and we do not want to break it now. It is heavy and we do not want it taken up. We do not want to give any of it away. We have an Agent here. They said to our Agent: "You go there and watch for the Indians." He is the Indian's new Agent. I am not much of a talker, I have seen you before, and I know you.

Shatkwitch (White River Ute)

The Indians don't like the opening of this reservation,—not only I, but all the rest here. We do not understand anything about this selling of our land. Here is our own reservation line over here. Here is water running from both ranges of mountains here. That belongs to the Indians. The Indians here are holding it back because they like it. I do not like this making ditches over the reservation. . . How are our horses going to range? We do not

know anything about selling this land. That is the reason I like it and I am holding it tight. I do not want any of it cut off. The Indians here like it. We need all that country down there for our horses to graze in, and the horses come to the streams for water. That is the reason I like this land. I do not want to sell it.

George Washington, (Uinta)

I am going to talk now. I do not talk very much in council. Whenever we council, I do not talk. I just sit and listen. All the rest of the Indians here have talked in council.

The one who always did our talking is not here,—old Chief Tabby. Tabby told me,—"Whenever White Men come here to talk about opening the reservation, do not listen. That is the reason I talk now. I am all alone, I have no relations. All I am thinking of now, is Washington. My heart is right. I do what Washington wants me to do. Washington told me to put my children in school to get an education, and I did it. I have my children in school. Washington says, "When your boys grow up, this land will belong to them." But what you tell me scarces me I want to die without having blood on me. I came from away over to this land here and I like this land. I hold it. I have no money: I am a poor man. I have minerals here in the mountains but even if I have, I am poor. That is the reason I talk to you. I have a father in Washington, but I am poor. I have no fence running around my farm. What you tell me here as coming from Washington, I am not going to pay any attention to. I do not want to talk about it. That is what I tell you now. We will let it go and let Washington do what they wish.

Warren, (Uinta)

My friend, I am the only old man now, all the other old men are dead: This land is what I am keeping for myself. We are keeping this water for ourselves. We are



holding on to this land. From the top of the mountains streams are running both ways. The other side belongs to the White Man. This country near the Duchesne we are keeping for ourselves. This wood we are keeping for ourselves. We have corrals all over the mountains here: that is where we brand our horses. My friends came up here with me and there are not many of us left. Here in this land are our relatives and children covered over with earth. That is what makes this land so heavy. Tabby, the chief of our land is there. I have heard somebody talk ever since I grew up: now I am an old man. There are children on this reservation. I am old.

That is the reason I have this reservation here. I am not going to give it up to the White Man. It is not buckskin or deer's hide, and I do not want to sell it. I do not want any of this land to be given up. I have it in my grip and I do not want to sell it. Here is the school filled with children. They will grow up soon, and the land will belong to them. They will have homes over the reservation. I don't want to be afraid of anything on this reservation.

Red Cap. (White River Ute)

This Agency is here and it was not put here for nothing. There are a lot of agencies but there is only one Washington. This reservation is heavy. The Indians have grown here and their bones are under the ground, covered over with earth. That is the reason it is so heavy. Those people in Washington, they shake my hand, but they do not want me to throw my hands away. My heart is straight. The Indians have understood what they have heard, and they hold this reservation, and they do not want any of it cut off. We want this reservation line to be just as it is. I hold it for my children, and I don't want to part with it. I have heard talk about selling before. Now that you have come here I am going to talk, as my father, Chief Tabby is dead. We do not like your talk about throwing it open. How is it that we lose our reser-

vation line? Where is it gone? I want everything on this reservation to be good and I don't want everyone coming in here. The reason I am talking so is because I am on the land here, which has been surveyed out for us. There is the Price road; it is the gate of this reservation. I do not want any kind of people to come in on this reservation. What you said about alloting this land, I do not like that.

Big Joe. (Uinta)

What the Indians say is that they want to hold this reservation. That is the truth. They all want to keep it. We want to keep it for the children in school. It is here they are going to live after a while. That is the reason we do not want the reservation to be opened. This has been in my mind a long time and I knew it was coming. The way it is now, the Indians can go where they like. That is good ,and we want it to be that way. Everything is good now, the way it is. Here is our wood on the mountains. I understand why it is that you are here. I was talking to my father in Washington. The Commissioner told me about it. We talked to each other. At the time when we were talking, I asked the Commissioner "How many are there of you?" I want to find out how many there are of you. The Commissioner said, "What is the matter with your reservation? You have a line running on your reservation and it cannot be changed." I heard all the Commissioner had to say.

Black Hawk, (Uinta)

I have listened to what you have said to these people. I can understand some of what you say myself. I do not like it. After you allot the land and sell it, I do not like that. I have no sense, and I know it, I just play with this land, but when I had money, I threw it away. I am here on this land. That is what holds me up. I do not want you to steal it from me. I do not know anything about



the Secretary or the Commissioner or Inspectors, and I do not know about any of this.

Ebenezer (White River)

That is all right. These fellows here are holding their reservation. It is the truth. I have been put on this reservation here. They tell me, "You raise what you want to eat." and I do that. Washington says that, and I do what Washington tells me to do. I put the children in school. This is my land. I am holding this wood back to burn. These streams of water here, I am holding them. We want them all. These Agency buildings belong to Washington. I am on this reservation, and I do not want this land thrown open.

Inspector McLaughlin.

Now my friends, I have listened to you and every word has passed into my ears. Every thing that you have said and everything that I have said is recorded by the stenographer here, and one copy will go to Washington where it will be read by the Secretary and Commissioner, and one copy will be left with your Agent for future reference as required. This is a transcript of all that was said yesterday as recorded here. (Holds up transcript of first day's council) What each of us said is here.

Now my friends, I have listened patiently to what your speakers said. I want to say a few words in reply, and hope that I will not be interrupted until I conclude. When I get through, I will be glad to hear any of you speak again. I have listened attentively to what your speakers said and I want to explain some things which seem cloudy in your minds. While I am surprised to find you so united in your opposition to the Act of Congress, I am at the same time, glad to hear you express your opinions. I said to you yesterday that we must be patient with each other, —I with you, you with me, so that you will understand everything the Secretary wishes to convey to you. A number of you speakers have said that you do not like my

words. My words to you have been truthful. If I had presented the matter differently or in any other way I would not have been stating to you what I was delegated to say. If I said things pleasing to your ears which were not truths the Secretary would be very much displeased with me.

Now my friends, the statements of your speakers have convinced me that you do not understand what I have said. From your speeches you are evidently laboring under a mistake by thinking that I am here to negotiate an agreement with you people. You seem to be impressed with the belief that I am sent here to make a treaty with you for the opening of your reservation. You lose sight of the fact, or do not understand, that this which I present to you is already a law of Congress. I am here to submit this law to you and explain every feature of it that you may understand, so that you may consent to take your allotments. One of your speakers said that every Indian tribe in this country had a reservation. That was formerly the case, but is not so now. There are now many former reservations that have been opened and the Indians have taken their land in severalty and live like white men in every respect. They have homes and farms and they can go to the polls and vote for Congressmen and county officers just as the white men do. Where that condition has been brought about we find the Indians have advanced more rapidly; they have become like their white neighbors in almost every respect. Now you are about to meet that condition on your reservation. Your reservation is going to be opened under similar conditions that governed the reservations in the Indian Territory, Oklahoma and elsewhere.

I was on the Kiowa and Comanche reservation last Winter and the Indians have started just as you are going to start here next year. Those people were just as much opposed to the new order of things in the beginning as you are, but you could not now get any of them to voluntarily return to the old conditions. They have railroads bringing markets at their doors for everything they have to sell. The same order will obtain here as soon as whites begin to settle in the country and your lands will enhance in value. Some of my friends here said if you take small farms you will have no land on which to graze your stock. Remember if you accept your allotments you have the choosing of your own location and you can select land having water; a field of ten acres of alfalfa will subsist more stock than five-hundred acres of these barren lands of yours. You could raise all you want for your subsistance on your farms, and remember that besides this Congress gives you 250,000 acres for grazing.



Now my friends, from the life you have led in the past, I do not wonder that you look unfavorably on this proposition because you do not understand it. I am pleased with the frank manner in which you have expressed yourselves in opposition to it, for it enables me to try and convince you by discussion that the acceptance of the provisions of the Act is for your best interests. Now knowing your attitude in the matter, as expressed by your speakers, it is my duty to try and convince you by sound reasoning, so as to bring you to understand the importance of your accepting allotments. Nearly all of your speakers said that you wished to do what Washington says; that you do not want to do anything against what Washington wishes. Remember I now bring you a message from Washington. That message is for your best interests. Remember the President of the United States has a great many people to think for. He has his red children and his white children. He is the head and the general director, and he has a cabinet among whom is the Secretary of the Interior, who has charge of land matters and Indian matters. Now the act of the Secretary is the act of the President in matters assigned to him, and Congress is the great council, the assembly of the representatives of the people. They make the laws and the President must execute those laws. All legislation enacted by the

great council must be signed by the President, after that it becomes the law of the country. It then devolves upon the President, becomes his duty, to execute that law.

Under this law which I read to you yesterday, the Secretary of the Interior is directed to send an Inspector to you to explain this matter of taking your allotments. If you consent on or before the first of June, next, to accept your allotments you will have the choice of your lands. If your consent is not obtained at that time or before, the land will be allotted nevertheless. Now my friends, these are the words which you say you dont like. It is true though and it is my duty to tell you. The Secretary has been directed to explain to you through an inspector and I am here for that purpose. Remember my friends, that the Secretary and the Commissioner are very much interested in your welfare. They will do anything they can to advance your interests, and this being the law it is your duty to comply with it gracefully. By accepting, and thus showing your good will, it not only strengthens you with the Department, but Congress as well.

My friends, your holding the reservation as in the past is out of the question. As certainly as the sun rises tomorrow it is to be opened. Now, the Secretary of the Interior, as a friend of the Indians, desires to have things made as easy for you as possible. Now, it is your duty to listen to reason and to the arguments which I have presented. Remember that our talk must be with no hard feelings. We must have our discussion in a friendly manner. I make this explanation to you because I see your talk has been all along one line. As I said yesterday, I do not want to hurry you. I want to give you ample time to consider, and I hope you will not close your ears to what I bring you from the Secretary, the Act of Congress which he is required to comply with and carry out.

Red Cap.

If you are telling us about this talk in Washington, let me talk there in Washington about it.



Inspector McLaughlin:

This is my letter of Instructions from the Secretary of the Interior and the Commissioner of Indian Affairs, ordering me to come out here. I read it to you yesterday.

Red Cap:

That is all right. I want you to take me to Washington. I want to take Chepeta and Charley Golota there too.

Inspector McLaughlin:

They are Uncompahres and have nothing to do with this business. A delegation to Washington could not accomplish anything at this time, this being already an Act of Congress and a law.

This has already been decided and cannot be changed. If a delegation was sent to Washington it would be only three or four persons with an interpreter, which would be only three or four of you people and all have an equal voice in this matter. It requires the signatures of a majority of you Uinta and White River bands to have the consent of you people acceptable to the Department.

Tim Johnson:

Your talk is not Washington talk. It is the Secretary's talk. I have heard the Secretary talk, and I know what he talks, and your talk is just like his, but it is not Washington's talk.

Inspector McLaughlin:

What does Tim Johnson mean by Washington? If he means the President, I told you a while ago, that the Secretary of the Interior is Washington in so far as Indian matters are concerned. The Secretary represents the President in Indian matters. Your going to Washington would not accomplish anything with the Department. The Secretary and Indian Commissioner would tell you just what I have told you here. Remember my friends, that the

Secretary of the Interior is represented here by me in this matter and is the same as present while I am here on this duty under his instructions. I am his mouthpiece, eyes, and ears while in the field under his orders. In having been assigned to this duty, anything you agree upon with me is the same as if you agreed with the Secretary, just the same as though you made an agreement with the President of the United States. My action in all individual cases of this character to which I am assigned is the same as if the Secretary of the Interior was present. He delegates to me certain powers in all cases to which he assigns me, and I am under special instructions in each instance by which I must be guided. My friends, notwithstanding that you have spoken in opposition to what have presented to you, I am very much pleased that you have taken part in this discussion. Your speeches have been very courteous and your attitude friendly. As we have taken up much time this afternoon, I think we had better adjourn till the same hour to morrow at which we met to day.

Shatkwitch:

The White River Indians are all coming here tomorrow. Inspector McLaughlin.

That is what I wish. I want all of you to come here and take part in this discussion.

Shatkwitch:

We will stay all day, every man till dark; we will talk without stopping to eat or sleep.

Inspector McLaughlin:

I will stay with you. I have the welfare of you people so much at heart that I want you to understand what is for your benefit and best interests. Your Agent will furnish rations in order that you may remain here at the Agency. Remember any time you wish to see me I will come to you and answer your questions.



There is one thing I wish to say: you have too many speakers. Remember I say this for your good. As two hours at a time in our joint councils is long enough, your council should get together and select a few of your best speakers to present your conclusions. It would be better in that way and will prevent confusion. I was recently among the Chippewas in Minnesota where there were thirteen hundred and forty belonging on the reservation, and they appointed five speakers to do the talking in our councils, and it simplified the work and made everything very pleasant and satisfactory to the Indians. I would suggest that you select such speakers to night from among your leading men.

Tim Johnson:

What you tell us to come and talk here for two hours at a time is good. The Indians have a council for themselves. They will keep on talking and it may be a month before they have done. They see you are their friends, and they are going to do as you say. After a while, when they get through talking, you will send the writing to Washington. They will read it in Washington and say, "That is the way they talk out there." They will know the Indians do not want the reservation opened. When the Indians tell you they do not want the reservation opened and do not like what you told them, that is the truth.

Inspector McLaughlin:

I wish to say in reply to my friend, Tim Johnson's remark that I know the Indians, when they say they do not like my talk, do not mean by that that they are unfriendly to me, but don't like the question which I present. But remember that Congress made this law, and the Secretary is directed to execute it and he has sent me out here to explain it to you people. That is all I have to do with it. The Secretary knows that I am a good friend to the Indians, else he would not have sent me to you people. As I told you yesterday, and as your friend who has

your interest at heart, I hope you will see the wisdom of consenting to accept your allotments under the provisions of this Act, and as desired by the Secretary of the Interior and all friends of the Indians. My friends, talk this over among ourselves and meet me here again at two o'clock tomorrow afternoon.

Council adjourned at 5-30 p.m.

Council reconvened at 2-30 p.m. Wednesday, May 20th, with 121 Indians in attendance.

John Reed, interpreting.

Inspector McLaughlin:

My friends, we have met again according to appointment. I am ready to hear anything you have to say. You have been counciling among yourselves, I presume, and I am ready to answer any questions you may wish to have answered.

Tim Johnson:

I have no other way to talk. This land belongs to me and I am going to keep it. There has been a line run around this reservation and I do not want it broken. I am not telling this for nothing. I tell it to you for the truth. It is a small piece of land I have here, and I am going to hold it. I am not going to give it up to White Men or anyone else.

Inspector McLaughlin:

My friend, I supposed from the explanation I made that it was plain to you that it is not for you to say whether this reservation is to be opened or not. I have been sent out here to explain that and obtain your consent to accept allotments. I have also explained several times to you that the Secretary is required under the Act of Congress to carry out this law. Prior to a short time ago, Indians were consulted in regard to opening their reservations. But under a decision of the Supreme Court five months ago, Congress may legislate in regard to opening



the surplus lands of the Indian reservations without consulting the Indians. Now my friends, with the best possible feelings towards you, I wish you to understand this matter as coming from the Secretary through me, that it is for your very best interest to consent to the Act of Congress and take your allotments. Now, my friends, it is useless to discuss this matter further on the line of arguments you have been making. It is not for you to say whether your reservation will be opened or not. All that is to be decided by you is whether you are willing to accept your allotments or not. Do not lose sight of the fact that the reservation is to be opened. What you have to decide is what way is best. If you do not consent before the 1st of June the Secretary is authorized to make the allotments anyhow.

My friends, I see you have a wrong idea as your speakers appear to voice. I am not here to ask your consent to the opening of your reservation, but only as to the taking of your allotments. That is the question for you to discuss and determine.

Sockive.

How did they take this land? Who gave them authority to take it?

Inspector McLaughlin:

I have explained that a dozen times. It was by Act of Congress. The great Council passed the law.

Sockive:

Does this land belong to Congress?

Inspector McLaughlin.

It belongs to the Government, except what you take in allotments.

Sockive:

You are telling what is not true. I am not going to give up this land.

Inspector McIaughlin:

It is all the same to me. It does not take a farthing out of my pocket or put one in my pocket whether you consent to this Act or not. But I am advising you to accept it for your best interests.

Sockive:

Even if it is right, still we are going to put it aside. You don't come here for nothing. I do not believe you are here in the interest of Washington. That's the reason we are going to put it aside.

Inspector McLaughlin:

I have sufficient proof here.

Sockive:

You have papers, but I have no papers. I have a heart, and my heart is here.

Inspector McLaughlin:

Yes; and I have a heart, and it is for your people here that I am thinking.

Sockive:

You have your papers in your pockets and everywhere. Where is my paper? I have no paper. You are a man and you see me here. I want you to listen to me. I have no papers to explain everything to you. If they said that it is all right but I am going to throw it aside. I am not going to give up this land. This land I travel over. We like this land and we are going to keep it. Our line, we do not lose that; we can't change it. This line runs here and we dont want it changed. This land belongs to the Indians and we are not going to give it to you. I have not two hearts, I have but one; I have not two mouths, I have but one. I am not going to talk any different. I am telling you the truth just as you say you are telling me the truth.



Inspector McLaughlin:

I wish all you people to listen attentively to what I am going to say. Your last speaker here seems not to understand what I have been telling you during the three days you have been with me. You seem to think that this is my doing. My talk seems to be displeasing to you, but I have told you the truth and every word I say is based upon the Act of Congress. Remember my friends, every man in this country is subject to the laws of the country and it is not only our duty but we are obliged to comply with the law. Every good citizen will accept the law. To say that I come out here telling untruths is very unkind. This matter has been published for weeks all over the country and every person that reads knows it. The newspayers have said that the Secretary was going to send an inspector to explain this to you and obtain your consent to the Act.

My friends, I do not blame you for your attitude in this matter as, from your talk, you evidently think you have the right to say whether or not the reservation shall be opened. But I am here for the purpose of convincing you to the contrary and to make it clear to you. I tell you there will never be another treaty made with Indians in regard to the disposal of their susplus lands. Since the decision of the Supreme Court, all surplus Indian land will be opened by Act of Congress, which will provide for compensating the Indians from the proceeds realized from the sale of their lands opened. I explained to you yesterday that in the past, when there were not so many people, in the country, large reservations were possible where the Indians had the privilege to roam and hunt. I told you that through immigration passing westward from the Atlantic Ocean in the east and from the Pacific Ocean in the west, the land has become very scarce so that all surplus lands of Indian reservations will soon be opened to settlement as has been done in numerous cases already.

My friends, you want to get rid of this idea that you

have the say whether your reservation can be opened or not. You are simply to say whether or not you will accept allotments. The survey for your reservation is already advertised for. The work will commence in a few months. After the survey is completed, allotments will be made. If you consent to accept allotments you have the selection of your own location, and you will have the choicest tracts. If not, under the law, the Secretary is obliged to allot tracts to each and every one, 80 acres to each head of a family, and 40 to each other member. These allotments must be irrigable land, and in addition to your allotments you will have 250,000 acres set apart for grazing purposes. This is the condition, my friends, and it is your duty to accept it gracefully because the law of the great council has said so. And it is the duty of the Secretary and of the other officials of the Department to see that the law is complied with. I hope for your own sake and the welfare of your children and those who are to come after you that you will look at this matter in a sensible light. As I said yesterday, I know very well that this being a new departure, something new, you are suspicious of it and very reluctant to act upon it and slow to consider it.

Tim Johnson:

I want you to sit down and listen to what the Indians have to say: they want to talk.

Inspector McLaughlin:

I know that if they talk along the lines they have been talking up to the present time it is of no use to listen to them. I am going to sit down when I am through with what I have to state. I wish to say though, that if they talk in the same strain they have been talking, it is useless to continue our councils longer. If they want to discuss this matter in a sensible and reasonable way, I am here for that purpose, but as to whether or not the reservation



is to be opened up to settlement is not the question, and it is useless for us to discuss that further because that question has already been settled by Congress. The reservation will certainly be opened and it only remains for you to decide as to whether you will consent to accept allotments or not.

Happy Jack. (Uinta.)

That's all right; that's good. You are talking to your friends; your friends are talking to you. You are a friend to us; we are friends to you. We are talking together to have an understanding. The people in Washington that talk about this reservation dont like Indians. I have been all over the country here among the whites. I have been to their towns and white people dont like me. I am of a different color from them. When I walk down Main Street they say "Watch that Indian; he will be taking something." They tell the police to keep a eye on me. That's the reason the Indians do not want white people to come here and take their land. I do not think it will be that way anyway. After the white people come in here it would not be very long till we would be all gone. They will say "We took your land, now we will take your house; so you get off this land; go to some other country and find some other place." That is the reason these Indians feel bad over this business. All over the country the white people dont like Indians. The land where the white man's towns are, belonged to the Indians at one time. That's the reason we cant come to any understanding. These Indians do not understand what you are talking about and you dont understand what they mean. The white man knows the Indians have something on the reservation. They are all trying to see who will come in first and racing with one another to get in first.

Inspector McLaughlin.

Happy Jack raised a question which is a very good one. Remember my friends, I will take nothing you say as

offense. You will respect me later when you find that my words have all been truths; and if we ever meet again in after years, you will say that my talk in these councils was straight. Happy Jack raised the question that white men would come in and take your allotments away from you. I will explain that. This is a great benefit which you people would derive by taking allotments, for the reason that the government gives you a trust patent for your land holding your allotment in trust for you for twenty-five years. During the trust period of twenty-five years your land is exempt from taxes while the white people around you have to pay taxes on their land.

During that time no person can dispute your right to your allotment or trespass upon it, and the allotee cannot sell his land till the trust period expires in twenty-five years. That is for your protection to secure your allotments. Then the proceeds of the sale of the unalloted surplus lands of your reservation goes into the treasury to your credit to be expended for your benefit in the discretion of the Secretary.

My friends I am here to listen to you and to talk to you and try to enlighten you in this matter, and apart from being the representative of the Secretary in this matter, I am here as your friend to do the best I possibly can for you. Therefore I trust that our discussions will be friendly and no hard feelings will arise between us. It will not be on my part I assure you.

Parank.

I do not understand anything about this paper. I am an Indian. I dont understand anything about papers. What you said about their talk there in Washington, I am afraid of that. I dont know anything about this, and I dont know what it is to have a little piece of land cut off. What will I do when I get in there on that little piece of land? When I get on that little piece of land I think I cannot go anywhere, cannot see anything. It will be just as when it is cloudy and raining, you cannot see anything;



it will be that way when I get on this piece of land; that is the reason I dont like it. When the sun is up I can see all around. I am not in the habit of talking in council. I tell you the truth. I am talking because we have a line around the reservation. This agency was built in the middle of this reservation long ago. I think the paper is in the office down there and it cannot be lost. If they throw it into the fire it would not get hurt, they will keep it. If it lays in one place it does not get old.

This reservation line is run all round; the iron posts are along the reservation that make the reservation line. That is the reason I talk because I like it. The white chief made this reservation.

Inspector McLaughlin.

This speaker has brought up a very good question. His remarks have brought up something which I will explain. He seems to labor under the impression that when a man takes his allotment he is confined to that tract of land that is alloted to him. My friends, when you take your allotment you are deprived of no privileges you have at the present time but other privileges are gained through the allotment. The tract of land alloted to you is your own individual tract of land. You can cultivate that piece of land if you desire or you can lease it to some person by approval of the Department, which is always granted. There are a good many Indians living on the rental of their allotments. The Department requires Indians to cultivate at least a portion of their allotment and they can lease the rest. As I told you yesterday the Kiowas, Comanches and other Indians were just as much opposed to opening their reservations as you are today to this change, but you could not get one of them now to go back to the old way of living, they are so well pleased with the new conditions.

Red Cap.

I do not like the things you say to me atall. All your talk is like dark night. My talk to you I want to be like

day-light. This agency has been here by Washington. It is here and you cannot change it. This agency is holding down all the streams here. It is holding the mountains and the timber. This belongs to the White River chief Sowawick. The line is laid around this land and there is no one who can come in upon it. They cannot break it nor crawl through it. I talk to you and what you are talking is no good. Thats all.

Appah.

I am going to talk to you today about this business that you are here for. We are going to talk now when the sun is in the West. We are talking here in our agency house and you say you are a friend to us and you are talking this unpleasant business here. Here are my young men around us. They are here and you white people should be my friends. Now we are talking what we think to each other. Here is our chief, my father. Our agent here, Capt. Mercer, is my father. The agency is down there and he is holding it down. I am not poor yet; I have a father at the agency. This land here where I am talking belongs to him.

I am not living on this land through a lie. What you are telling here I cannot understand. I understand this agency and this reservation that I live on. My friend tells me about this Washington. My boy is living on this reservation. I dont want people coming here to settle this land. They cannot come and settle it. When they talk that way we dont understand what they are talking about. This is a big thing here and they cannot steal it. They cannot steal it by a lie. I dont like it. What I am telling you is the truth. I am not telling you this for any joke. Even if you do say that I do not believe it. I do not want you to steal Washington's mouth. You are a good man. What you are talking may be truth. The agent here never came in here with a lie either.



Capt. Joe.

The reason these Indians are talking is, if Congress did this they do not like it. They dont understand this paper. They dont know how to read if they did understand it. You are talking, we are listening. We dont feel hurt through you at all. They are wondering why they talk that way in congress. We never heard it before. We do not like for them to come and steal our land. This land here belongs to us—all this land here. Not only Congress knows about this reservation, but all white people, that this reservation belongs to us. We have a school-house here and our children are going to school. When our father talks to us we do not say "No, no". The Indians say that even if Congress did say that they dont want them to take this land because it belongs to the Indians. Even if they did say that this land is to be taken away we do not want it to go. If they do say that we want them to drop that talk, we don't want to shed any blood about it. We don't want you to get mad about it, you are our friend and we want you to say "all right, my brother". These Indians do not understand all the white man is doing. I do not know how many years this reservation has been here; it may be thirty years since this belonged to us. I don't want the white man to drive us on little farms. I don't like for white men, to talk hard to us. Everything will go smooth, there will be no hard feelings. That is what all the Indians say.

Sowsonocutt:

This man tells the truth: they like this land. They want to keep it. They are not here for nothing. This land has been bought. That's the reason we do not want the white men to take it. The land belongs to me, I do not like for them to come here and talk to me about that. That makes me scared when you are talking here. The Indians have their stock running over this land: that is the reason they like to hold it. Even if the white man does say he is going to take this land I am not going to give it to him. This land was bought, I bought it.

Terras,

The way these men are talking I like that. Our chilren are on this reservation and all our things are here. The reason I am talking is because I have my living here. We do not want to go the way that man is talking in Washington.

Uncasam,

I want to know what you are talking about. You are talking about allotments. That is not good, I do not like it. I am telling that to you. This land the Indians do not want to sell. They do not want anybody coming to cut this land.

Inspector McLaughlin:

A number of your speakers have said that you do not want your land stolen from you. My friends, these hills, these streams, these valleys will all remain just as they are. There will be no change in the nature of the country but the improvements that will come when white people come in among you. My friends, Red Cap said my talk was cloudy, and you do not understand it. You are the people who are in the dark in regard to the force of this act of congress, and I am trying to bring you into the light. You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but Congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundry line to this reservation. Each of you will have a boundry to your individual holdings and there will also be a border to that 250,000 acre tract set apart for pasturage. You fear that you are going to be confined to the tract of land allotted. That is not so, and I will explain a little more clearly. For many years you have occupied this large tract of land known as your reservation, and when you went outside that tract the white men you met thought you had no right to travel outside the reservation, but when you take your allotments you can travel like white men and you will not need a pass. Your Agency will be continued just the same as now; the Agent will have full jurisdiction just the same as now, to protect your interests, and as citizens you will have the protection of the laws of the state to redress injuries against you. The opening of the reservation and taking of allotments give you a great many privileges you do not enjoy at the present time. Remember your allotments are exempted from taxation for twenty five years. You will receive what is called a trust patent for your respective allotments which secures the land to the allottees and their children, and none of you can sell your individual allotments during the trust period of twenty five years. Now my friends, I think we are coming nearer each other and that you understand me. The question of opening the reservation is not with you; that has been determined by the act of congress. One of your speakers said that Washington never sent out that word before. That may be true, but I am now here to announce it to you, and my friends, I wish you to understand fully and clearly the import of the words which I convey to you. We want to discontinue useless discussion as to the opening of the reservation and take up the question whether or not you are willing to take your allotments as provided in the act.



Tim Johnson;

You do not talk like they talked to me in Washington, you talk as though you stole Washington's mouth. Here are men who were with me in Washington. The Secretary talks just the way you have been talking but the president don't talk that way. He did not talk that way when I was there. I don't believe that you come from the president. You are not from Washington; you are from where congress is. They should not have sent you here. They should have sent some one here to ask the Indians about this first. We did not talk about this allotment when I was there. They told me "when those fellows talk don't pay attention to them. If they talk about you land like

that don't let it get into your ears". While we were talking there the secretary telephoned, and Washington, said "Pay no attention to him. I do not want him to come into my house. Let him stay out there". That's the reason we are holding back on this, The secretary told us about this $1.25 business. That has been talked before.

Inspector McLaughlin:

With reference to the statement Tim Johnson has made, no act of congress becomes a law until signed by the president and I am here today talking to you people and presenting to you the will of the President, because he has signed the Act and made it a law, that is, the Act of Congress for opening your reservation was approved and signed by the President and it therefore is sanctioned by him. The Act having been approved by him it now becomes the duty of the Secretary of the Interior to carry out that law, as he represents the President in Indian matters. My friends, I have no doubt but that if you were in Washington two years ago the officials of the Department may have told you that your claim to this reservation was good. That was before the decision of the Supreme Court of five months ago which I have told you of, since which decision the policy of consulting Indians in regard to opening their reservations has changed. My friends, Congress has passed a law opening your reservation and the president has consented to it by signing the Act. Under that act you may consent to take allotments of your own selections and if you refuse they will be arbitrarily allotted to you, and in addition to your individual allotments 250,000 acres will be set apart for your common grazing grounds. That will be done on or before a year from the first day of next October and your surplus land will be thrown open for settlement on that date. Therefore, my friends, it is for you to decide whether you prefer selecting your allotments for yourselves or that they be arbitrarily assigned to you. It is useless for you



to talk along the lines you have been talking. You should now confine your deliberations to the consideration of the one proposition, that is, the acceptance of your allotments. Therefore, for the remainder of this day, to night, and tomorrow morning, confine yourselves to the consideration of this question whether you are willing to accept your allotments or have them arbitrarily allotted to you. You have been wasting time trying to discuss a matter entirely foreign to the question before you. Remember the question before you is, will you consent to accept your allotments or not? Think of this question and try to give me an answer to it to-morrow afternoon at two o'clock. We will now adjourn till two o'clock tomorrow afternoon.

Sockive:

I am telling you the truth and I am not telling you a lie. We do not talk two ways. All these men say that. They talk only one way. They do not want this land cut up. That's what I am telling you. I am not going to give you this land. You come here tomorrow and talk about it.

Council adjourned at 5:45. P.M.

Council reconvened at 2 o'clock p.m. Thursday May 21st with 112 Indians in attendance.

John Reed interpreting.

Inspector McLaughlin:

My friends, we have met again according to the understanding when we adjourned yesterday. I am ready to listen to anything you may have to say, and hope you have come to some conclusion in the question submitted to you.

Parank:

What we are to talk about has been before us a long time and we haven't anything else to say about it. This that you are telling about that Congress has done is not very old. It is not old yet. We dont want it to go that

way. That's what I say, and that is what I think. I want it put aside.

Red Cap.

This reservation line has been there for a long time. This what you are telling now is new. This what I am telling you is old. I am not going to throw that aside. This what you are telling about what Congress has done, is not very old. It is not old yet. We don't want it to go that way. That is what I say, that is what I think. It has been here before the white men and the Morman came. What you are telling is new. This new talk you have brought in, I want it turned aside. It has been going as it is since before I was born. Your talk is nothing, I want you to say "yes", I want you to say that it is to go the way I talk. I want you to say, "I am listening".

Inspector McLaughlin:

I wish to reply to my two friends who have just spoken. They have brought up a point which is a strong argument in favor of what I am presenting to you. An old law always remains till displaced by a new one. Since the establishment of your reservation you have been governed by that old law referred to by your speakers. My friends, Governments are like people. The older the more advanced they become. Those of you now here know a great deal more than your fathers, because you have been advancing, and your children will know more of the white man's ways than you do. Our Government is advancing steadily just the same as the people and our Congress has come to the conclusion that the best thing for the Indians of the country is to break up their reservations and settle them on individual allotments. That old law which these two speakers have referred to has been abolished and this new law takes its place, which from this time on will govern in dealing with you as with other Indian tribes. I have taken great pains to explain to you that it is useless to think of retaining the reservation as in the past.



You and I might talk here for a month and we would make no change in that. All your wishes would effect no change in that law. This being the law my friends, the next best thing for you to do is to accept what will be of the greatest benefit to you. The question of consenting to accepting your allotments is the one you are to consider and determine upon, as passed by the great council and signed by the President of the United States. That is the simple, plain question before you.

Tim Johnson.

These men here are telling you the truth about this reservation for they have been here a long time. This line was put here a long time before the white people came. This talk of Congress is new and has only lately been made. We do not want it to go that way. Their talk in Congress is not very old. This is our land where we were born and that is the way we want it to go. Thats the reason I say "I wont let you have it". What I tell you is good. You are my friends and I want you to say "yes".

Inspector McLaughlin.

My friends, I know the status of this reservation and how it was established. There was a certain tract of land here withdrawn from settlement and set apart upon which any Indians in Utah might be located. It was in 1861—41 years ago, that it was thus set aside.

I have no fault to find with you for the view you take of it, you having been under that system a great many years. But since my arrival here I have been trying to impress upon you, and make you understand clearly, that these conditions have ended and a new law has displaced the old one. And you must conform to the new order of things and accept this act, it being now a law. The Government is the best friend of the Indians and will do nothing which is not for their benefit in the end. Remember your lands are not being taken away from you by this Act. You are receiving allotments and it is only the sur-

plus lands that will be opened to settlement. I am telling you the truth, my friends, and you must bring yourselves to look upon it in the proper light.

Appah.

I do not understand what that new law is. I do not understand about our reservation line made by that old treaty, how this new law can throw that off. I do not understand that. I do not know how it is that the President put his name on that Act of Congress. You are pulling me round from this line here. I do not feel very happy when you do that. I do not understand why Washington's name was put on that. When you cut our land up and put me on a piece of land I don't understand it. You say, it is thrown open and it seems I can't understand it. You have not shown it plainly enough for me. I can't understand why you are pulling me round over the country, but you are pulling me round like a horse. You are pulling down the Agency and you are pulling the school down too. This is why I don't understand it. You have it hid in your pocket, and I don't understand it, and it seems as though I had no sense. I am not going to think the way of this new law. Why don't you throw that law away? You are just like a storm coming down from the mountains when the flood is coming down the stream and we can't stop it. I have this reservation line fixed and you can't throw it aside.

Happy Jack.

We have all met here now and are talking. We are your friends and we don't want any trouble. Let us be friends. You have your friends, and we Indians are your friends. We are shaking hands together and we don't want any quarrels. I am going to talk to you now why I am afraid of this; and afraid of the White man. Long time ago we had a talk in the old school house here about allotments and throwing the reservation open. Senator Rawlins was there. I am afraid of this because the White man don't like the Indians. They don't like our flesh,—



our color. After that, Senator Rawlins went back and Judge McConnell came. I understand all about that. Judge McConnell said, "We want to lease your reservation mines, those elaterite mines", and he said, "You Indians will have lots of money. I will pay you every three months." The Indians had a council and said, "All right. We have a father in Washington. We will go down and see what he says about it." Charley Mack was interpreter. Tim Johnson, Sowasina, and myself, and it took us six days to go. We went into Washington in the night when the electric lights were all bright. There was a carriage with four horses and we rode to a hotel. We went into a fine building, got fine rooms, good beds and everything nice. Next day we said, "We want to go and see our father. They told us, "You change your clothes." They told us to go to the store and get clothes. We went there and bought what we wanted of clothes. We then went out, and they pointed out a place to us and said, "That's the place." There was a fine big white house there. Around it there were no buildings, but there were some soldiers on one side and some solders on the other side. There was an iron fence around it, and at the gate were two Negro policemen with badges on. The Agent had a pass. When we went to the door these Negroes stepped in front of us and the Agent gave them a paper. We went on inside. At another door were two more Negro policemen; they stopped us the same as the first two did. Then we went on inside and sat down. After a while a bell made a noise, and at one side, through a door, that opened we could hear some one walking. We all lined up. He came into the doorway with a smile on his face and he did not look mean. He had a smile and he came and stepped in front of us and spoke to Charley Mack and Charley spoke to him. Then he came up and shook hands with Charley and all of us. He said "All right, my boys." We were there only a little while, not very long, and we went out again. The President's name was McKinley. The next day we went into the place where they talk. (Congress) We then went to a house where they had no stairs.

There was a hole in the middle and a cage that took us up and they locked the door, and we went up quick. And when we came to a floor they opened it and we were introduced to the Commissioner of Indian Affairs. We shook hands with him but we did not talk very much, just a little bit. The Commissioner told us that this land belong to us. He said that the White Men around our reservation did not talk right. And he told us, "These White Men, they are stealing my mouth, because I am a long way from them." We were shaking with fear before going there, but when the Commissioner told us that we felt as if we were alive again. We felt all right, and came home feeling good. We got the Indians together and told them about our trip. That lease did not go through very soon. It was six months before that went through so that the White Men could mine. That is the reason why these Indians refuse to believe what you are telling them. President McKinley thought a great deal of the Indians. I liked him very much. After that, the man who liked us so well was killed by a White Man. The Indians felt very bad over it. They did not like to hear that their father was killed and it made them all feel bad. I do not know this new President, but I have heard that his name is Roosevelt. He does not like my flesh back there. The good talk that was talked to the Indians is all changed. They do not talk that way now. He is talking now in Washington, and he says, "Yes, open the reservation." I don't like that; these Indians do not understand that. That is the reason these Indians do not think that what you are telling them is straight. These men here, when Washington told us to go and make farms, we did it. We like to do that way. We said, "Yes". Our great chief talked that way. They said, "We want your children to have an education: send your children to school. The children have no education; they die and go under the ground without knowing anything." Now they do not know what to think of it when that paper comes here. They just look at you, and don't



understand it at all. When they are talking about that, they cannot get anything out of it.

Inspector McLaughlin:

I want to say that Happy Jack has made a very good talk. His description of his trip to Washington is doubtless true and quite interesting. His estimation of President McKinley is deserving and very commendable. He was a good man, loved by all who knew him, and was a true friend of the Indians.

We never had a President who knew more about the Indians than President Roosevelt does. He has spent months at a time among the Indians on the frontier, and when our war with Spain broke out, he went to Cuba with a regiment and had many Indians in his command. When Congress assembles in December, each year, the President sends a message to Congress, and President Roosevelt has sent two such messages, in which he has always recommended, in the strongest language, the Indian's welfare. I thought I had a book in my pocket containing an extract from his last message, but I have not. In that message to Congress he spoke most kindly of the Indians. I want you to feel that you have in President Roosevelt, as good a friend as you ever had in any President. Remember that while being at the head of the Government, he is only an executive officer, and is required to carry out the laws of Congress. And as this Act of Congress has been approved by him and has his signature attached to it, its provisions must be complied with, and the Secretary and the Commissioner, who act for the President in such matters, will see that you are justly treated and that you will receive every dollar realized from your surplus lands. I am very glad that Happy Jack made his speech as it has enabled me to advise you of this.

Parank:

I think there are minerals on this reservation. Washington knows where to find them and that's the reason I want

to keep it. On this reservation, there is gold and silver and this black stuff. (gilsonite) That's why I am talking. I am afraid of it. I am talking because I am afraid. If I saw Congress making this law, I would listen to it. I would talk different if I knew Washington talked as you do. I have this land for my children. I am saying this to you because you are my friend.

Inspector McLaughlin:

You need not be afraid of the White men. You have an agent here. He is a war chief and will take care of you. Tomorrow I want you to come here again at two o'clock and I hope we can finish this business then. I don't want to hurry you but the sooner our council terminates the better. Meet together to night and council among yourselves and try to be ready to vote on this question when you meet me tomorrow. We will now adjourn till tomorrow at two o'clock.

Council adjourned at five o'clock, p.m.

Council reconvened at two o'clock p. m. Friday May 22, with 120 Indians in attendance.

John Reed and Vernie Mack interpreting.

Inspector McLaughlin:

My friends, we have met again, and I expect to hear from some of you to day as to the results of your council last night. I expect to hear some conclusion which you may have reached. I want to call your attention to one thing that I have observed here yesterday and again to day: when you sssemble in our business councils you discuss among yourselves. I would prefer that you would confine your discussions of that kind to your tribal councils before coming to this council.

My friends, remember that it is not a question of opening the reservation. It is the question whether or not you consent to take your allotments under the provisions of the Act of Congress which I present to you. I have taken



great pains and explained to you repeatedly in every session; that Congress has already provided for opening the reservation and the only question for you to decide is whether you are willing to take your allotments or not.

Tim Johnson:

You had your talk in Congress. Now we talk to you, and when you tell us you are going to open the reservation, we say "no". We will not open the reservation, and we want you to say "Yes". The reasons the Indians want to keep this reservation are because it belongs to us. That's the reason we say "No" to you. I will talk the same as on the first day, and you can talk the same as I did. Say "Yes" or "No", I am not going to give up to you.

Inspector McLaughlin:

My friends, it is not for me to say yes or no because, I have told you, that has been decided by the Act of Congress. My friends, I have heard all this before. I am here to get the mind of each and every one of you Indians in regard to this matter. Every day, during our councils, I have heard the same expressions from the same persons, not exceeding fifteen of you people, while there are present a great many who have not expressed themselves. The same few individuals have been speaking and they seem to dominate the council and have not allowed others to speak and express their wishes. I do not know what the feelings are of those who have not yet spoken. I am ready at all times to listen to you express yourselves, and it is your duty to listen to each other and not interrupt any one who attempts to express his views to this meeting. Now remember, my friends, each one of you may express himself in regard to the matter. I wish to hear from some who have not thus far spoken. A few of you have monopolized these meetings to the present time. I speak this with the most friendly feelings towards all of you,

and I hope you will take it as coming from one who has your best interests at heart.

Appah.

We are having council to day. We are just having a talk of what we think. We do not mean any trouble; we have not anything to get mad at each other for. This Agency down here is down under the ground now. That is the reason it is so heavy; this Agency is solid, it is looking after these streams and the mountains. Everything on this land here, it is holding the reservation line down. That is why it is so heavy. The Agency is old; it has been here a long time before the White People came. It is holding down right solid; that is the reason it is so strong. Nothing can move that line. That's the reason you cannot throw it away. That's what I say.

Sockive:

This Agency is so heavy it cannot be moved; that's the reason the White Men cannot throw it out. This Agency is guarding all the streams that come down from the mountains. It is guarding the reservation line. That is the reason this line is so heavy. I don't care how big anything is, it cannot take this line and throw it away. Are you a stout man that you can get this line and throw it away? That's the reason I am not going to give this land to you. Say "Yes". What you are talking is not right.

Inspector McLaughlin:

My friends, I want to tell you people that your Agency will remain just as it is. You will have an Agent provided who will look after your interests just as at the present time, and any change that is going to take place will be for the better, as you will have individual allotments. I am not here to take anything from you. I am here simply to tell you what is provided for by the Act of Congress. My friends, I think it unnecessary to repeat again what



I have told you so often before, but I will say this legislation is provided for your benefit. The Act of Congress gives you to the 1st of June to consent to accepting your allotments, and it is very desirable that you consent to accept them before that date, and I am here for the purpose of obtaining your consent. Remember that after you take your allotments, you will receive the trust patent, a strong paper, from the Government, and after you receive that, no one can take your land from you. It passes down to your children and those who come after you. Your land is exempt from taxation for a period of twenty-five years; no lien can attach to it and you cannot sell it for a period of twenty-five years. My friends, if you could only separate the question that is in your minds from the actual question before you, I do not think you would hesitate long in deciding upon accepting your allotments.

Parank:

Now we are having a talk before you. You are here to day telling this to us. The Indians do not know where this paper was made. They did not see it;—that's the reason they say they do not know anything about it. That is what we are talking about now. The Indians are talking about this reservation line that has been put here for a long time, and they cannot understand why it is thrown aside. It was put down a long time ago, before any of these people were born. This line is quite heavy. Now they are trying to throw it aside. It is so heavy that no one can throw it aside. They are talking about it now just as they were when it was made here. They think it is still running here. That is what they are talking about now. We do not want to throw it to one side. That is what the Indians say. We have our Agency down here. It is just the same as it was before. The paper is in the office down here; it is lying in the office watching the reservation line. It is watching the timber and the water.

Red Cap:

Our Agency is here now and has been for a long time. It is right square in the middle of the Reservation. The treaty is here in the office. It is watching all things around here. The Agency is watching all this land. This Agency has all the streams and the timber here upon the mountains. It knows these mountains and hills. Look up and you can see them lying around. You cannot take away these things; they are right heavy. Nobody can take them away, nor lift them,—I don't care how big he is. Are you a right stout man that you can carry them away?

Inspector McLaughlin:

My friends, it is my duty to try and enlighten you in this matter,—even if I fail to bring you to believe in the way I would wish to have you look upon it. I want to tell you what many of you do not know; this reservation never was what is known as a treaty reservation,—it is an executive order reservation. It was established by order of President Lincoln in 1861. President Lincoln set aside a piece of land here within which no White man was permitted to come unless authorized by the Government. This reservation was not given to you outright, it was simply reserved for your use, and upon it any other Indians of Utah could be located who might be brought here. Large reservations are a thing of the past, and all surplus lands of Indian reservations will soon be opened to settlement, but the Indians will be assured of their homes and compensation for the lands opened. I have explained to you people several times since we have met that the Supreme Court of the United States rendered a decision on the fifth of January last, nearly five months ago, which gives Congress the power to legislate in regard to Indian reservations without consulting the Indian. It matters not how the reservation was established, whether by treaty or by order of the President of the United States. Under that decision, Congress has enacted legislation which has become a law and received the sig-



nature of the President which opens your reservation, as I have explained to you. You seem to be under the impression that this Act is going to take away from you all your land, but such is not the case: Congress has provided that you will receive compensation for all lands outside of your allotments. The proceeds will go into the Treasury of the United States for your benefit. After you receive your allotments the line which you say is so heavy that it cannot be moved will be obliterated and the surplus land, except 250,000 acres reserved for grazing, will be opened for settlement. You can take your allotments anywhere within your present boundary line, but they are to be irrigable lands, that is,—land that can be watered by irrigation. The 250,000 acres will be reserved as common grazing ground for you people,—that tract is to be located south of the Strawberry River,—it cannot be north of the Strawberry River. After you receive your allotments, the rest is open for settlement and can be located upon by persons desiring to come into the country. This land will be taken under the public land laws of the United States. All homesteaders proving up upon their claims will have to pay $1.25 per acre into the treasury to your credit. Provisions is made by the Act of Congress that you are to receive your allotments before the reservation is opened. If you consent on or before the first of June you have the selection of such tracts as you desire. If you refuse to accept your allotments the Secretary is then directed to cause the allotments to be made to your arbitrarily. You can lose nothing by this, my friends, but you will gain many privileges, as I explained yesterday, which you do not enjoy while holding your lands in common. I have explained the importance of this question to you time and again, placing it before you in various ways, and have tried to make you understand this simple proposition, and you cannot have failed to understand if you have kept your ears open to what I have said. You must not think, my friends, that I am interested in this at all other than

desiring to see you benefited. For your own sake and that of your children, grandchildren, and those who come after you, it is your duty to accept this proposition.

Sockive:

All right. You did not say that this is not your talk, —you did not say that. That is the reason I do not want you to talk about it. I tell you that I want to keep this reservation. This is not your talk. I want to keep this land. I do not want you to talk very much about it: I am not going to give you this land. These men back here all want to keep this land. They are going to keep it. These men here will not give it to you even if you do ask for it. You are not going to cut this reservation into little pieces. We do not want you to talk about it. This land where our children have grown up,—where our dead are buried, we don't want to let any of it go.

Terras:

I say these Indians want to keep their land. I like this land. This Congress that is talking, we do not pay any attention to. Congress can not open this reservation.

Sovsonocutt:

We hear these Indians talking. They say they are not going to give you their land. Can you hear what they say? If you hear what they say, you want to say "Yes" to what they say to you. We are not telling you this for fun. This land where we were born and raised, we will keep it. That is the reason we say "No," we do not want it to go that way. We want to keep it. This is our land. We want all the land. We do not say we would give it to you. We keep telling you "No." This is not talk for fun either. It has been here for a long time, this Agency, and it is not here for fun either. It is holding this land down. You cannot ask this treaty in the office any question. That is what is holding this reservation. We do not want our reservation cut up in little pieces of land. That is the reason we say "No."



Happy Jack:

Now you are our friend and we are having a talk. You come from Washington to tell us a whole lot of stuff. You came here to tell these people what they said in Washington. You tell them "I am here for that business." They listen to you and they say "yes." They hear what you are talking and they tell you what they think about it. They listen to you when you say, "You take your land in allotments." That is the reason they are giving you their answer. They are afraid of the White man. When the White man talks, the Indians are afraid. The Indians understand the White Man pretty well. That is the reason they are talking so. When the Indians take their land in allotments, they will lose everything they have. That will not be good. After they lose everything they will be poor. They will not have anything,—they are afraid of that even if you do say they will be better. These White Men do not like Indians any way. They will get into fights,—they will kill the Indians and lock them in jails. What you are telling will not be any good for us. The Indians do not want to be shut in. They want it to be so they can see a long way on the reservation and travel every place. They like to be as they are now, so they can come in and sit down and do what they like. You listen to what they are talking. You tell these Indians here what Congress in Washington told you. I have heard you say that. That's the reason I say as I do now.

Inspector McLaughlin:

I have been listening very patiently to your remarks but we do not seem to get any nearer than in our first council. I have the minds of a few of your very clearly as expressed by individual speakers but I would like to hear from others.

Appah:

We are having a talk with each other now. We are not going to do any harm to each other. We just talk to

each other. I am talking good to you. I talk to you the same as you talk to us.

Columbus:

You seem to be Congress. This is where I raise my horses. Now I can go where I want and visit my friends. I like it now here as I can go where I like and never be bothered by anybody. Am I going to take my horses and drive them like sheep over to that pasture land you are talking about? That is why we will not, listen to what you say. We want to keep this land here ourselves.

Charlie Sireech:

This Agency has been put here by a good man. The man that had a big heart and his arm was strong. That is what Captain Beck said. Nobody can break Washington's arm. That is why I listen to what Washington says. That is why I am Washington's boy. That's why I want to keep this land. I have been put here by him. He tells me, "Stay on this land and grow up on it." He says, "You can do what you want to do." That is what the Indian's are doing now. The Indians here listen to right good talk. The Agent has heard it and he said it was good talk. That's the reason the Indians are talking. They want to hold this land. They are not going to do what you want them to do.

Inspector McLaughlin:

I will just speak a few words more. My friends, there is one thing that pleases me;—you all speak well of Washington. Washington is your best friend,—your protector. Now from your expressions, one would think you would be always ready to do what Washington wants. I am here presenting the wishes of Washington to you. And it is for your good to consider the words of Washington as coming to you for your best interests. He wants you to accept what I have placed before you.



Sockive:

You tell us the same things every day.

Inspector McLaughlin:

I tell you what is true and for your good. You will think more of me later when you find that I have told you the truth.

Little Jim:

I am going to talk to you anyhow, even if you have no ears. This reservation has not been put here for the fun of it. Washington put this reservation here and all other reservations all over this land. This Agency is Washington's thoughts, and it is good. That's the reason you cannot open this reservation. You can see this line running here: you know where the line is. That is there, and you cannot do anything with it. You can take a horse and put him in a good corral and he is still there. He cannot get out. When you have a good corral the horse cannot break out. We have an Agent here. We like that. It makes us feel good. These soldiers at the Post are down there and we feel good. They are for our protection. This line is right here and the soldiers are watching it. They are down there watching everyone to see that they do right. Washington said,—"No one can take any part of this land I will not allow it." Washington said,—"We will put these Indians on this land and they will be the same as one big tribe." I am not saying this for nothing. Now you did not know about this treaty so I am telling you that now. I know this because I heard Washington tell it. Now this land was put here for the Indians, not for everyone; it was put here for us. That's the reason we want to keep it. We keep it for these young people growing up. We all say we do not want to have the reservation opened, and we do not think you are doing right. We do not want this land cut up in small pieces. (Shakes hands with Inspector)

Yumbuts:

This land here belongs to me. That's the reason I am going to hold it. I am not going to give it to you. Your talk is only one way, and our talk is another way, and my talk is right good.

Inspector McLaughlin:

I have so far, heard mostly from the White River Indians. I would like to hear from the Uintahs what they have to say.

Grant. (Uinta)

I want to talk and will talk now. I have a mind of my own. I think that Congress should have sent a man out here before this law was passed, to talk with the Indians and have an understanding with them. Then we would have got along easier. I do not know anything about this allotment business and I sit back here and listen to the two sides. I do not know which way to go. It hurts me a whole lot. They pull me one way and the other, and I don't know which way to stay. I work on my farm and raise crops. Now, when they come here cutting the land into little pieces it looks as though they would do me up. That's the reason I do not like it. What are my horses going to do when I have only a little piece of land? Must I tie my horses in that little field? That's the reason I do not like it.

Inspector McLaughlin:

You have three children, you will get a large piece of land.

John Star. (White River)

I have just come down from the saw mill where I have been working. I just got here now. You see me and I see you. My flesh is black: you have good flesh, you are white like this paper here. My flesh looks like the ground. That's the reason I like this land; my flesh is like the land. That's the reason I am going to keep it. Why should I give it away? I like it: I was raised here. That's the reason I have got it right in my heart. I am pretty well



acquainted with the White Man. I know him. The White Men want something all the time. They want everything. They are after this land and are troubling me all the time. If I have cattle the White men will come in and drive them off. Then there will be trouble. That's the reason I will not give it away.' Are you going to take our land? I want you to say "No", whether you are going to take it or not. I want you to answer me.

Inspector McLaughlin:

I am not here for anything for myself at all. I am here to give you the words of Washington.

Wapsock:

I am not going to talk very much now. Who it is I am going to talk to? Is it to you? That paper on your table, is the same as if it came out of a hole in the ground. That's why the Indians are talking as they are about this. That says you are going to open the reservation. I say, "How are you going to do it." What is the reason for it? How can you open it? I think like this: when the White Men come flocking into this reservation our Agent would keep them back off the land. That's all I am going to say. It is just like if a man had a horse and some one asked for that horse. He would say "No."

Ebenezer:

What I told you yesterday was good. Congress don't know, and I want you to tell these people. It is the truth I am telling you about this. These Indians want to keep this land. They tell you this. They know what you tell them. We don't want you to tell anything that is not true. This that you are telling, how long before it is to be that way? When this happens, will the game wardens bother us?

Inspector McLaughlin:

No person will bother you. You will be protected by the laws of the Government.

Ebenezer:

We are afraid to go and see our friends off the reservation. We are afraid on account of these cowboys.

Red Cap:

That is not good. That is what I say. This Agency down here, it is on the reservation. You do not know where it is: you have not seen it. It is right there, however; nobody can pick it up and throw it aside, no matter how big a man he is. Your talk is not good. I like this land. I want you to say "Yes". It will not be good if you don't say "Yes."

Inspector McLaughlin:

Replying to my friend Red Cap, I would say that I know that you are attached to the land, and it is to secure the best part of it for each of you that I was sent out here by Washington. My friends, if the entire reservation was of any benefit to you, and you could make proper use of it all, you would not be disturbed in its possession. But there is more land here than you need. Congress has provided for the opening of this surplus land in the way I have explained. Washington desires to secure for each of you, and for each of your children, such a tract as you may select.

Sockive:

Can you hear what I say? We will not give this land up.

Inspector McLaughlin:

I have heard all your speakers have said, but do not think it is the real sentiment of a majority of the people of this reservation.

Sockive:

You keep saying the same thing. That's the reason I keep saying the same thing to you. I talk to you the same as you have talked to me.



Inspector McLaughlin:

There is a great difference my friends, between your talk and my talk. I bring to you a message from Washington and am speaking to you now as a friend. There is a great difference between the talk I am giving you and what you are giving me. I am here to represent the great Government of the United States in this matter. I explained to you the law which has been enacted by the Great Council, the law that has been approved by the President of the United States, whom you call Washington. I have explained to you that it will make no difference what you say as to whether the law will be carried out or not. Your protests that you keep making to me, even if made to the President himself, would not change it because it is already a law. Our record is loaded down with all that has been said by you people and be me in regard to this matter. (Holds up records of previous meetings) I will forward all this to Washington, the Commissioner, the Secretary, and possibly the President himself will read it. This will show what we all have said. I talk to you very plainly trying to explain the Act of Congress. Your talk has been simply along one line, and that is protesting against the opening of your reservation. My friends, you seem not to have grasped the thought that what you have been discussing is already past, and all your talk on that line amounts to nothing. You are on record as being opposed to it. The reservation, my friends, will be opened up notwithstanding your protests.

I will repeat what I have said before, that it is unnecessary to discuss on that line any further. The question that you should give your attention to is whether you want to accept allotments or not,—not the opening of the reservation because that is already provided for.

Quinn:

These people, what do they say to you? Where did you find the key to this reservation to open it? That's

the reason I don't understand even if you do say it is provided for. I don't believe it. You say you are here, and that you have this paper as your authority.

If they find the key to this reservation, to open it we will give it to you. You come and throw it on the table and say, "Here, I have the key to this reservation. Throw it down here so I can see it. When you throw your key to the reservation out here, I will believe you.

These people who are taking this land, have they money to buy this land? Will they give us all the money the land calls for? I will not give it to you even if you say that.

Inspector McLaughlin:

It is not to me the land is going: I am not taking it.

Wanrodes:

My friend, I like these mountains and I like this water; I like the timber; I like the coal in the coal mine. The mountains have range for my horses. I do not think Washington will take away what he told me I had got. Here am I and Henry Harris and some others around here. We want to keep this. They all say we want to keep all these things. We want a place for our horses to graze.

Here are these people, David Copperfield, John Duncan, and others: they want to hold these mountains and this water. We want to keep them. We have farms down here on the Bench where there is no timber: we want to hold those farms, and we want to hold some of this timber up here in the mountains too. I want you tell the truth, and not tell anything crooked.

I do not like this 250,00 acres of pasture land. I have a cattle range at Rock Creek west of here and north of Strawberry River. What will they do with my cattle range? I want you to fix it so I can hold that piece of land.



Here is Henry Jim. He was talking to me yesterday evening. Henry Jim said that your talk is good, it is all right. He liked it.

I would feel more satisfied if you could say it was more than 40 acres for one person. I have lots of cattle. I hear that if we do not come to you and say that we agree, you will go back and say: "These Indians would not agree to this." Then they will come back and give me land. I do not like that. I want to pick my own land.

Now here is Hump. He has come to live with the Indians. I do not like anyone to carry a gun on the reservation. I have my farm that Colonel Randlett made for me and I want to hold it. I have a good farm from which I sell hay and get $8.00 a ton. Some times I get 400 dollars from it and I put it in my pocket, and I like that. I like what you say. I like it that I can go where I wish without a pass. I can go and see my friends the Bannocks or anyone else.

Now I want you to give me my piece of land on Rock Creek where my cattle are.

Game:

You are come to talk with these Indians, you see your friends here. You are just come to talk with these Indians here now, and you are not going to take any of our land. That is the reason I talk to you this way. That is the way everybody talks to the White Man. You sit here and you have heard what everybody is saying. I want this reservation to be here still as it has always been. This is where we have been raised.

Charley Mack:

They ask now what the Indians say. I heard what you were saying. The Indians here have been listening to your talk and I have been listening too. I don't quite understand that Congress talk. These Indians used to be good friends to the Government. When the Government was fighting the Cheyennes and Arapahoes, our Indians

used to go as scouts for the Government. The Government said: "we will stop this spilling blood, we will not have any more fighting." The Indians said, "All right." and it was done. The Indians kept their word in this, and now this thing comes out here and we do not understand it. Why are they talking this way? Why are they opening this reservation? What is the reason Congress did not talk that way before? They used to be holding back; they did not want to see this reservation opened. Now they come and say: "Open it up." What is it? Why is it? What have we done? I don't like the way Congress has been talking.

Before they passed such a law, someone ought to have come here and spoken to the Indians first. That is the reason the Indians are so scared,—it has come so sudden. They were not expecting anything like this. That is the reason they are so scared.

What are the Indians going to do? It is like sand. You throw water upon sand and it will cave in and wash off: so with Indians, after a while there will be none left. The reason the Indians are so scared is there is no more land. If they take this land away from us we can find no more land to go to. We are done for. We are afraid of the Mormon people. They do not like the Indians. If an Indian goes into a Morman's pasture for his horses, the Mormon would kill him. That's the reason they are afraid. This opening business is the same way. The Indians will have a farm near a White Man's. If the Indian tries to get water for his farm, some White Man will stop this, and maybe take a shovel and strike him on the head. There will be a lot of drawbacks. Many of these young men here, cannot talk English. There will be disagreements and quarrels all the time.

Now, when you go back there you can tell those people in Washington that I am not mad. I do not want anyone to do me up. I do not understand why Congress came to this. How was it? These Congressmen must have been



scared by some rich man. They may be afraid of the people who elect them, that if they did not pass it they would not be elected to Congress again.

That's why I am afraid to change my mind, I cannot, because I do not understand why it was passed so soon. I want it the same old way and keep the reservation just as it has been.

Tim Johnson:

These White Men who have farms on the bench take too much water for their grass. If many White men come in here they will hold all the water and make the Indians pay for what they want. These Indians will gain nothing by letting their land go. You will not listen to the Indians. You are getting a lot of money, you are getting paid for this. Over in Heber City they have a tunnel and they are stealing water from the reservation. The fishes in the streams, the White men will steal them from us. They come over and kill the fish with dynamite. You talked to me before in this house. You told me to put my children in school. You said then, "The White Men will not bother you about your land at all." Now it is changed. You said, "If any White Man comes here about your land don't you listen to him." Where have you thrown that talk now? You were there when this law was passed in Congress, and you ought to have told Congress that you had promised us to hold back. It seems that you had thrown Washington's mouth away. I am not telling you this because I am mad. I am telling you this because you are my friend. Now I want you not to say anything more. You can't gain anything by talking here any longer.

Inspector McLaughlin:

I feel called upon to correct some statements of my friend, Tim Johnson. True I visited this Agency two years ago and advised you to place your children in school. I also said you need not fear anything from the

Whites; that you would be protected from the White Man on your reservation. But I never said to you that you need not listen to an official of the Department who visits you to talk to you under orders of the Government. The President has power to send his officials to any place in the United States, and when he gives them an order it has to be obeyed, and I am here under such an order. I will also say that I was not in Washington last winter when this law was enacted. I was there the winter before when they were discussing your affairs and I did what I could to have that item of $70064.48 appropriated to pay you for the Uncompahgre allotments (212) on your reservation and for the strip of land east of the Uinta River opposite Fort Duchesne which you complained to me about when I was here two years ago. The first Act provided for the withholding of that money until you consented to take your allotments and I spoke to the Department officials about it, as I regarded that money due you from former agreements. The President required Congress to pass a joint resolution eliminating that clause before he signed the Indian Appropriation Act of last year. I did everything I could for you in that matter a year ago last winter. I spoke to several Senators about it when it was under consideration and told them that you ought to be paid that money as it was due you from the Government. And I was very glad when I saw in the newspapers that you were going to receive that money without waiting for your consent to accept allotments. I was your friend in that matter and Tim Johnson's insinuations as to my being unfriendly to you was unkind. There was no power or influence that could change the will of Congress in enacting this law which passed last winter in regard to your reservation because under the decision of the Supreme Court, which I have mentioned so often, Congress had the right and the power to so legislate, and did so. The law has been enacted and your reservation will be opened under its provisions, and



it is to make it better for you that I would wish you to accept your allotments under the provisions of the Act. It would be pleasing to the President, the Secretary, and the Commissioner, and also to Congress, on whom you have to depend in future.

I feel, my friends, that I have done my duty in this matter. I have explained it so clearly that you cannot fail to understand it fully; but it is very difficult to convince persons who do not want to be convinced. We have been discussing this matter for the past five days, but our councils have been dominated by a few persons who seem to have intimidated and deterred those from speaking who might have expressed opinions in conflict with theirs. Those who have spoken failed to discuss the question I have placed before you. You do not seem to have considered the advantages that allotments would bring. Your speeches have been on another line:—that of retaining your reservation. Feeling that I have done my duty and that there is nothing that I have left undone, and believing that if we continued our councils for a month, with the same speakers dominating our councils, that I would be unable to bring you to my way of thinking, and feeling that it would be time wasted to continue longer, I will call you together only once more.

Tomorrow will be our last council. My friends for your good, for your welfare, and for your future prosperity, I feel it my duty to leave nothing undone,—and will therefore prepare a paper for the signatures of those consenting to the Act, and bring it here tomorrow, and read it to you in full council? Those desiring to accept allotments can come to the office at any time after I read it to you in council and sign their names. I will prepare the paper referred to tonight or tomorrow morning, and read it and explain it to you here in council tomorrow at two o'clock p.m. Then, any of you wishing to sign, can come to the office and attach your signatures to it. Those who do not wish to sign, well and good,

each individual should be privileged to do as he wishes in the premises.

We will now adjourn til 2 o'clock to morrow afternoon, and I hope that you will all be present, as it will be our last council.

Council adjourned at 6-15 p.m.

Council reconvened at 2 o'clock, Saturday May 23d, 1903, with 134 Indians in attendance.

John Reed and Vernie Mack interpreting.

Inspector McLaughlin:

My friends, according to agreement yesterday evening at the time of adjournment, we now meet that I may read the paper which I have prepared for the signatures of those who wish to subscribe to it. It is very short, but meets requirements. (reads)

*Uintah Indian Agency, Whiterocks, Utah*
*May 23, 1903.*

We, the undersigned, adult male Indians of the Uintah and White River Utes of the Uintah Reservation, in the State of Utah, in consideration of the provisions of the Indian Appropriation Act of May twenty-seventh, nineteen hundred and two, amended by a paragraphgraph in the Act of Congress of March third, nineteen hundred and three, making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes, hereby give our assent to the provisions of said Acts, and hereby ratify and accept the same.

In witness whereof we have hereunto set our hands and seals this twenty-third day of May, nineteen hundred and three."

I have prepared this in duplicate, the two copies just alike. I hand one of them to your Agent that he may file it in his Office.



My friends, we have held six councils and have been discussing this matter for the past six days. This is the last public council that I intend holding with you for this purpose. When we adjourn to day it will be the final adjournment. I feel that I have done my full duty in placing this matter before you people that you might understand every clause and phase of it. And I am confident that each and every one of you understands the full meaning of this new law, and it is now for you to determine whether you consent or not to the acceptance of your allotments under the provisions of the Act. All consenting can sign this paper which will be in the Agency Office while I remain, and I will be here for three or four days yet. Any person desiring to sign can come to the Office and subscribe his name to this paper. Every Uintah and White River Indian here has the right to determine for himself in the matter and express his individual preference. It is not my intention nor the wish of any Government Official that any undue influence or coercion be used in obtaining your signatures. You are each and all free to sign this paper or not, just as you may feel disposed. Every word spoken in our councils has been recorded by the Stenographer and I have 45 pages of typewritten transcript here which contains the first three days' Councils. All that you have said and what I have said is shown in this record, and will be forwarded to Washington for the Officials there to read.

That is why I will have to remain here for three or four days yet to have the transcript written up from the notes which the Stenographer has taken down. There are two copies exactly alike, both made at one time by the same tick of the typewriter. This copy will be left with your Agent here for reference, so that any one of you wishing to recall what has been spoken, may do so by calling on your Agent. I wish to say that I am much pleased at the way you have conducted yourselves throughout our councils, and I will so report it to the Department. Now, as your friend, I have a few more remarks to make before leaving you.

Any person wishing to sign this paper must be allowed to do so without intereference on the part of any other person. If any of you wish to speak further, I am ready to hear what you may have to say, and no person should disturb another while he is speaking. It is discourteous and improper for any person to interfere or interrupt another while he is speaking. Every one of you has the same right to be heard.

Sowsonocutt:

I say that I don't believe your talk here, and I am not going that way.

Inspector McLaughlin:

You need not sign if you do not want to. You have talked so often and all in the same strain that it is unnecessary for you to speak further along this line. All that you have said in protest is shown in the record, and it will go before the Department.

Remember that any man signing this paper, his signature will show that he has consented to the provisions of the Act which I have fully explained to you.

Henry Harris:

Charley Mack and others here have requested me to say that they would like to hear our Agent, Captain Mercer, express himself about this.

Captain Mercer:

Mr. Inspector, I am going to speak a few words in behalf of the Indians in response to the request for me to do so.

There are a few Indians here who, it would seem, do not understand the difference between accepting allotments and acceeding to the opening of the reservation. Others who do not believe that there is a law to open their surplus lands, or believing it, say they do not want their lands opened nor allotments made. These Indians have talked and their talk has gone on the records to be



sent to Washington. There is no one yet who has stated and gone on record that he would accept his allotment, yet there are Indians who understand the law and know it is not the question as to whether their lands should be opened or not. That is settled by the law, and they do not care to talk of it. These Indians I speak for knowing the law and understanding it, know that it is no question to discuss. They are friendly to the Government, the Government is friendly to them. They have asked me to send a friendly message through these records to their friends in Washington. They want their words to go to the Commissioner, the Secretary, the Senate and the House of Representatives. They want to say to them, "Friends, you have forgotten some very important things in your law, very important to us. We would like to have you consider them. We believe that when you have considered them you will change the law to the extent that you will grant us these favors." They say that they have quite an industry here,—they have a coal mine. From that mine, they have hauled to the schools and agencies 200,000 pounds of coal. Since I have been here, less than two months, they have delivered at the Post from the mine, 100,000 pounds of coal for which the War Department pays $6.80 per ton. This has offered them a chance to get a little ready money which they will need and are glad to take advantage of. In addition to that, they have been in the habit of selling wood to the schools and to the Post, and I have put in a bid to the Post in behalf of these Indians, for 1600 cords of wood for next year. I expect to secure thereby an opportunity for these Indians to furnish this wood at $8.50 per cord; I have also offered in their name, to furnish 500,000 pounds of coal for which I expect them to receive $6.80 per ton. Now, our friends in Washington will see that we have industries here, which the Indians handle themselves under the supervision of the Agent. It has been said that these Indians would not work. These Indians will work, and work well. They say, "Our new Agent pays us promptly." That is all they

want. They must have food for themselves and horses; they are not capitalists, and they cannot work two, four, or six months without pay, as they have been obliged to do. They like the plan of getting weekly payments which I have arranged for them at my own risk,—the money being allowed but not on hand. More than two hundred have been working since I took charge,—this in addition to those who have worked on their farms.

The law provides that the allotments shall be made on lands which can be watered; that is right. These are good lands for farming, but their friends in Washington have forgotten that they have taken away the timber from them. There is no timber on these lands. I suppose there will be 1,000 allotments made upon these lands. I judge that on these allotments, there will not be 50 cords of fuel. There are no trees for fense posts, no logs with which to build their houses. All the coal and timber are on these lands which are to be opened for settlement. Now these Indians here, who know that the coal and timber are to be taken, want to be friends of the Government, and they would like to see such alterations in the law as to prevent the entire deprivation of their timber and coal resources. Logs for their houses, posts for their fences, and wood and coal to burn for fuel,—are all to be disposed of. Some of this coal should be secured to them. There is a big vein of coal that runs along these mountains just back of us for 40 miles. The Indians would like to secure of that coal land just a little patch, say 160 acres,—within 8 miles of this Agency, where some very good coal can be mined, and a good road running to it whereby coal can be hauled from the mine. If the one small tract where that coal is convenient to them could be reserved for the Indians, they would have plenty of coal for the next 50 years. The Indians say that if all this coal and timber land is opened to settlement, they will be obliged to buy their fuel of the new possessors $6.80 per tone for coal, and from $6.00 to $10.00 per cord for wood. They must



have fuel to burn and lumber for their houses. There is another matter: the Agency saw mill about 13 miles from the Agency, a fine plant,—that saw mill and the ground around it should be reserved for the Indians. The timber and wood for several miles about it should be secured to them. The timber is near the mill scattered over the rough mountainous country,—lands unfit for farms, and it is believed without value as mineral lands. There is plenty of timber and fuel for the White Men on other lands that are to be disposed of. That saw mill gives them square logs for building common houses, flooring, shingles, and laths. Most of the lumber used in this vicinity is shipped in from Oregon and costs a great deal of money. It is very necessary that they have some timber from which to make their own lumber. Another thing about which they are very anixous is the water that runs in the streams through this reservation. Of course the lands need water. There is more than enough water in these streams to irrigate all the lands, and for all other purposes, but they ask their friends in Washington to make provision to secure them enough water so that the White settlers, through waste or averice, will not in the future be able to take it away from them. Under official hydrographic survey, measurements for the volume of water in these streams have been taken at regular periods for the last four years, and data pertaining to this work can be obtained in Washington. They trust that their friends in Congress can secure to them for all time, a sufficient quantity of this water for their allotments so that they will never be deprived of it, by the White man. The Agency, the School, and the Hospital lands are not mentioned in the law; that should be provided for. It can, of course, be done without changing the law; it can be be withdrawn from settlement by executive order. These are the things which they hope their friends in Washington did not put in the law because they forgot to consider them. They send their frendly message to them, hoping they will amend the law and yet secure to

them those resources which are absolutely necessary to their existence.

Now I want to say a few words to the Indians:

My friends, I have sat in the council for six days and heard every word you have spoken. I think I know what is passing in your minds.

You seem to think that under the new condition you cannot have freedom to move about as now. As far as that is concerned you will probably never know the difference. You will have your roads; you will have your Agency, just the same as now, and you can come and have your camping grounds at the Agency, and visit among yourselves as now. Your Agent will remain here with you, and you will be protected just the same as you are now. Instead of being one big tribe of Indians, one bunch, one herd, every man can stand up straight and feel that he is a freeman, a citizen of this great country,—just the same as the White Man. Those who have farms now will have the same secured to them as far as possible.

Now, I want to say to you that I was in Washington on the third day of March last. I sat in Congress. The Commissioner sat by my side, and we heard Congress making that law which the Inspector has read to you, and I am sent here to you to be your Agent under the new conditions which are to replace the old ways. I understand that my duties are to look out for you and protect you under that law. That is the way the matter stands now. It is not what many of you seem to want, but it is the way it stands now. My friends, we will have to live under the law the Inspector has explained to you. I am glad that he came here because he has told you all about it. If he did not tell you, it would by my duty to tell you what he has told you. A good many do not seem to believe it is the law. I know that after he goes away, I will have to tell you about it. So I prefer to do it now. What the Inspector has told you,—every word of it,—is true. I know many of you do not like it. I know many of you would have it changed, and still many more



would like to see the law modified to secure to you some of the coal and timber, and you know that from what I have said to the Inspector, that I agree with you in that respect. These are important matters that have been left out by accident, and these things should be put in. Now the best way to get them, my friends, is to accept this law and show that you are going to do the best you can. And then we will probably be able to secure our own coal, our timber, and our water. I have been with you for only a short time, but I know all about you. I have good feelings for all of you, and knowing and feeling towards you as I do, I say if I were an Indian, I would say to our friends in Congress, "You want us to sign this; you want us to carry out what you believe to be best for us and for the White People." And then by showing my good will, try to secure these things which were left out. If I were a White River or a Uinta, I would walk up there and sign my name to that paper.

My friends, I am going to stay with you long enough so that every one of you will be able to see that I am your friend and that I have a straight tongue.

Inspector McLaughlin:

My friends, I have listened attentively to the speech made by your Agent, first to myself and then to you people.

The appeal that your Agent has made, speaking for you, for a timber reserve and a coal reserve, I regard as a very just appeal. And when it is brought to the attention of the proper officials and Congress, I am in hopes that they will see the justice of doing something of that kind for you. Everything said here has been taken down, and will show in the records of our Councils, and I promise tc unit with your Agent and do what I can, by proper representation of the matter, in trying to have such reserves set apart for you.

My friends, your Agent's advice has been all that a father could give his children, and no father will give his

child counsel that is not for his best interest. Your Agent has advised you for your best interest, and all good children should look up to their father and listen and obey his advice.

My friends, I repeat again, that I am very much pleased with your courteous treatment of me since I have been here with you, but before closing our council I am going to give you another piece of advice. This paper which I have read to you will be at the Agency Office while I remain here, and I would like to see all of you come in and sign it, at least a sufficient number to make it acceptable to the Department, so that I can have the required number of names attached to the paper that will go forward to Washington. The Government at Washington is your best friend and does not wish to impose any hardship upon you people, and does that which is for your best interests. I have already told you that the survey of your lands has been advertised for (that is put in the papers) and the survey will soon be authorized. The surveyers will soon come upon the reservation and commence to survey the lands,—this being necessary in carrying out the law. Now, my friends, you must not interfere with these people because they will be under Government authority, and will be under the protection of the strong arm of the Government. Do not think that they are here to do you an injustice or impose any hardship upon you. I speak this so that you will not interfere with them. Remember the White People are not coming in to take farms right away,—not for sixteen months yet.

I shake hands with each and every one of you with a good heart. I leave with no enmity against any of you people and I hope you feel the same towards me. As I said before, I will be here for some days yet, and any of you wishing to sign this paper will find me in the Office. Should I be out, some of the clerks will be there so that you may attach your names to it. This is a matter in which all Indians act individually,—each male person over 18 years of age acting for himself. I have no more



to say to you. This Council now stands adjourned sine die.

Council adjourned at 4-30 p. m.

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I hereby certify that the foregoing is a true and correct transcript of the proceedings of Councils held by James McLaughlin, United States Indian Inspector, with the Indians of the Uintah Reservation, Utah, from May 18th to May 23d inclusive, 1903.

/s/ John F. MacKey
Stenographer.

Uintah Agency, Utah, May 26, 1903.

## APPENDIX B

### LEGISLATIVE AND ADMINISTRATIVE DOCUMENTS CONFIRMING DISESTABLISHMENT OF ORIGINAL UINTAH RESERVATION

| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| LD 116 | Jan. 15, 1906 | 40 Cong. Rec. 1064 | ". . . lands which were heretofore a part of the Uintah Indian Reservation . . ." |
| LD 116 | Jan. 10, 1906 | 40 Cong. Rec. 1332 | ". . . lands which were heretofore a part of the Uintah Indian Reservation . . ." |
| LD 117 | Jan. 12, 1906 | Senate Report 139, 59th Cong., 1st Sess. | ". . . lands which were heretofore a part of the Uintah Indian Reservation . . ." |
| LD 119 | Jan. 18, 1906 | House Report 291, 59th Cong., 1st Sess. | ". . . lands which were heretofore a part of the Uintah Indian Reservation . . ." |
| LD 120 | Jan. 27, 1906 | 34 Stat. 9 | ". . . lands which were heretofore a part of the Uintah Indian Reservation . . ." |
| LD 122 | Feb. 9, 1906 | House Report 823, 59th Cong., 1st Sess. | ". . . Indians on the former Uintah Reservation . . ." |
| JX 331 | Apr. 11, 1906 | Opinion of the Asst. Atty. General, I.D. 549 | ". . . the lands formerly within the Uintah Indian Reservation . . ." (at 549-550) |



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| LD 124 | Apr. 13, 1906 | Senate Report 2561, 59th Cong., 1st Sess. at 131 | ". . . the former Uintah Reservation . . . |
| LD 126 | June 8, 1906 | Letter from Acting Commr. of Indian Affairs, found in Sen. Rep. 4263, 59th Cong., 1st Sess. at 2-3 | ". . . the former Uintah Indian Reservation . . ." (at 2, first paragraph) |
| LD 126 | June 11, 1906 | Letter from Sec. of Interior, found in Sen. Rep. 4263, 59th Cong., 1st Sess. at 1 | ". . . the former Uintah Reservation . . ." (at 1, first paragraph) |
| LD 127 | June 21, 1906 | 34 Stat. 325, 375-376 | ". . . the former Uintah Reservation . . ." |
| LD 128 | June 25, 1906 | House Rep. 5010, 59 Cong., 1st Sess. | ". . . the former Uintah Reservation . . ." |
| LD 129 | June 29, 1906 | 34 Stat. 611 | ". . . the former Uintah Indian Reservation . . ." |
| LD 130 | June 12, 1906 | 40 Cong. Rec. 8306 | ". . . the former Uintah Indian Reservation . . . |
| LD 130 | June 27, 1906 | 40 Cong. Rec. 9386 | ". . . the former Uintah Indian Reservation . . ." |
| LD 131 | 1906 | 40 Cong. Rec. Index Senate Bill 321 | ". . . lands which were heretofore a part of the Uintah Indian Reservation . . ." |
| LD 131 | Apr. 24, 1906 | 40 Cong. Rec. 3553 | ". . . for Indians in the late Uintah Indian Reservation . . ." |
| LD 132 | Sept. 1, 1906 | Proclamation 34 Stat. 3228 | ". . . the former Uintah Indian Reservation . . . (at 3228, last paragraph) |

| Doc. No. | Date | Type of Document | Status Reference |
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| | | | ". . . are hereby restored to the public domain." (at 3229, first full paragraph |
| JX 336 | Sept. 26, 1907 | Letters from and to the Acting Commr. of Indian Affairs, respectively | ". . . the former Uintah reservation, Utah . . ." (at 1, first paragraph; at 3, first paragraph) |
| JX 338 | Nov. 8, 1907 | Letter from First Asst. Secty. of the Interior | ". . . the former Uintah Reservation in Utah . . ." (at 1) |
| JX 339 | Nov. 11, 1907 | Letter from Chief Clerk of the Office of Indian Affairs | ". . . the former Uintah Reservation in Utah . . ." (at 1) |
| LD 135 | Apr. 30, 1908 | 35 Stat. 70, 95 | ". . . lands of any Indian of the former Uintah and Umcompahgre Reservations . . ." |
| LD 136 | Dec. 16, 1908 | Letter from Commr. of Ind. Affairs, located in House Doc. 1279, 60th Cong., 2d Sess. at 2-3 | ". . . the former Uintah Reservation (at 2, second full paragraph; 3, last paragraph in letter) |
| LD 136 | Dec. 19, 1908 | Letter from Secty. of the Interior, located in House Doc. 1279, 60th Cong., 2d Sess. at 1-2 | ". . . the former Uintah Reservation" (at 2, seventh line) |
| JX 341 | Dec. 19, 1908 | Letter from the Secty. of the Interior to the Secty. of Treasury | ". . . the former Uintah Reservation." (at 1, first paragraph; 2, first paragraph; 3 last paragraph; 6, last line) |
| LD 137 | Feb. 24, 1909 | 35 Stat. 644 | ". . . the former Ute Indian Reservation . . ." |

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| LD 138 | Feb. 14, 1910 | Sen. Rep. No. 219, 61st Cong., 2d Sess. | ". . . the former Uintah Reservation . . ." (Note: the words "former Uintah Indian Reservation also appear in the title of the report.) |
| LD 139 | Apr. 4, 1910 | 36 Stat. 269, 285 | ". . . the former Uintah Indian Reservation . . ." ". . . the ceded Uintah Indian Reservation . . ." |
| JX 343 | July 9, 1910 | Letter from the Acting Secty. of the Interior, 39 I.D. 79 | ". . . the former Uintah Indian Reservation . . ." (at 79, first paragraph) |
| JX 345 | Feb. 3, 1911 | Letter from Commr. of Indian Affairs | ". . . the former Uintah Indian Reservation . . ." (at 1, first paragraph) |
| LD 141 | Mar. 31, 1911 | 36 Stat. 1058, 1074 | ". . . the former Uintah Indian Reservation . . ." "the ceded Uintah Indian Reservation . . ." |
| JX 346 | May 1, 1911 | Letter from Supt. of Irrigation | ". . . the former Uintah Reservation, Utah . . ." (at 1, block quote) |
| JX 347 | May 16, 1911 | Letter from Acting Commr. of Indian Affairs | ". . . the former Uintah Indian Reservation . . ." (at 1) |
| JX 348 | May 19, 1911 | Letter from first Asst. Secty. of the Interior | ". . . the former Uintah Indian Reservation . . ." (at 1, first paragraph) |
| JX 349 | June 3, 1911 | Letter from second Asst. Secty. of the Interior | ". . . the former Uintah Reservation . . ." (at 1, first paragraph) |
| JX 351 | June 27, 1911 | Letter from Asst. Commr. of Indian Affairs | ". . . the former Uintah Reservation . . ." (at 1, first paragraph) |
| JX 352 | July 12, 1911 | Letter from First Asst. Secty. of the Interior | . . . "the former Uintah Indian Reservation . . ." (at 1, first paragraph) |

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| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| LD 146 | Sept. 23, 1911 | Letter from Chief Supervisor, contained in H.R. Doc. 892, 62d Cong., 2d Sess. (July 27, 1912) at 8 | ". . . the former Uintah Indian Reservation . . ." (at 8, first paragraph of letter to Means) |
| LD 146 | Sept. 30, 1911 | Joint Rept. by Special Inspectors to the Secty. of the Interior, contained in H.R. Doc. 892, 62d Cong., 2d Sess. (July 27, 1912) at 1-2 | ". . . the former Uintah Indian Reservation . . ." (at 1, first paragraph) ". . . and there were restored to the public domain . . . 1,004,005 acres . . ." (at 2, fourth paragraph) |
| JX 356 | June 1, 1912 | Letter from Supt. of Uintah & Ouray Agency | ". . . formerly a part of the Uintah and White River Indian Reservation . . ." (at 1) |
| LD 142 | June 15, 1912 | Sen. Rep. No. 893, 62d Cong., 2d Sess. | ". . . the former Uintah Indian Reservation . . ." |
| JX 357 | July 2, 1912 | Letter for Second Asst. Commr. of Indian Affairs | ". . . formerly a part of the Uintah and White River Indian lands . . ." (at 1, first paragraph) |
| LD 143 | July 8, 1912 | H.Rep. No. 943, 62d Cong., 2d Sess. | ". . . the former Uintah Indian Reservation . . ." |
| LD 144 | July 15, 1912 | 48 Cong. Rec. 9012 | '. . . the late Uintah Reservation . . ." |
| LD 145 | July 20, 1912 | 37 Stat. 196 | ". . . land which was formerly a part of the Uintah Indian Reservation . . ." (first paragraph) |

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| JX 358 | Aug. 8, 1912 | Letter from Commr. of General Land Office | ". . . land which was formerly a part of the Uintah Reservation . . ." (at 148) |
| JX 359 | October 1912 | Dept. of the Interior Memorandum | ". . . restored to the public domain . . ." (at 1, line 3) ". . . the former Uintah Reservation." (at 1, line 13) ". . . the former reservation lands . . ." (at 2, line 11) ". . . this is no longer an Indian reservation . . ." (at 3-4) |
| JX 361 | June 7, 1913 | Letter from Second Asst. Commr. of Indian Affairs | ". . . the former Uintah Indian Reservation . . ." (at 1, first paragraph) |
| JX 363 | May 12, 1914 | Letter from Commr. of Indian Affairs | ". . . the former Uintah reservation . . ." (at 1, first paragraph) |
| LD 149 | Dec. 7, 1914 | Letter from Secty. of the Interior, located in H. Doc. 1250, 63d Cong., 3d Sess. at 2-3 | ". . . and there were restored to the public domain . . . about 1,004,285 acres . . ." (at 2, sixth paragraph) ". . . the former Uintah Indian Reservation . . ." (at 2, last paragraph; 3, block quote-last line) |
| JX 366 | Feb. 9, 1915 | Letter from Commr. of Indian Affairs | ". . . the former Uintah Indian reservation . . ." (at 1, first paragraph) |
| JX 367 | May 29, 1915 | Letter from Asst. Commr. of Indian Affair | ". . . the former Uintah reservation . . ." (at 1, first paragraph) |

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| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| JX 376 | Apr. 15, 1916 | Letter from Secty. of the Interior | ". . . lands within their former treaty reservation . . ." (at 9, second full paragraph) |
| JX 377 | Apr. 26, 1916 | Letter from Asst. Attorney General | ". . . the former Uintah Reservation . . ." (at 1, first paragraph) |
| JX 378 | May 3, 1916 | Letter from Acting Asst. commr. of Indian Affairs | ". . . the former Uintah Reservation . . ." (at 1) |
| JX 379 | Aug. 10, 1916 | Bill of Complaint in case brought by Secty. of the Interior | ". . . as Trustee of the Indians of the former Uintah and Ouray Indian Reservation," (at 1, caption; 2, first line) |
| JX 382 | Jan. 24, 1917 | Letter from Asst. Secty. of the Interior | ". . . the former Uintah Indian Reservation . . ." (at 1, first paragraph) |
| JX 383 | Feb. 23, 1917 | Letter from Asst. Secty. of the Interior | ". . . the former Uintah and Ouray Reservation . . ." (at 1, first paragraph) |
| JX 385 | May 19, 1917 | Letter from Commr. of Indian Affairs | ". . . Indian lands formerly within the Uintah Reservation . . ." (at 1, first paragraph) |
| JX 388 | Feb. 28, 1918 | Letter from Sen. Smoot | ". . . the former Uintah Indian Reservation . . ." (at first paragraph) |
| JX 389 | Mar. 9, 1918 | Letter from Commr. of Indian Affairs | ". . . the former Uintah Indian Reservation . . ." (at 1, first paragraph) |



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| JX 390 | Apr. 13, 1918 | Letter from Asst. Secty. of the Interior | ". . . the former Uintah Reservation . . ." (at 1, first paragraph) |
| JX 391 | June 11, 1918 | Letter from Sen. Smoot | ". . . the former Uintah Reservation . . ." |
| JX 392 | Dec. 3, 1918 | Letter from Asst. Attorney General | ". . . the former Uintah Reservation . . ." (at 1 first paragraph) |
| LD 154 | Apr. 23, 1920 | H.Rep. 901, 66th Cong., 2d Sess. at 1 | ". . . to the unsold lands formerly included in the Uintah Indian Reservation . . ." |
| JX 401 | Mar. 20, 1922 | memorandum from Chief Supervisor of Forests | ". . . the former Uintah Indian Reservation . . ." (at 1, second paragraph) |
| LD 155 | May 14, 1920 | 41 Stat. 599-600 | ". . . lands in the former Uintah Indian Reservation . . ." |
| LD 179 | Sept. 7, 1922 | Letter from Secty. of the Interior, located in H.Rep. No. 370, 77th Cong., 1st Sses. (April 3, 1941) at 9, 12 | ". . . former Uintah Indian Reservation . . ." (at 9, first and last paragraphs; at 12, first and last paragraphs) |
| JX 403 | Sept. 28, 1922 | Letter from Commr. of General Land Office | "ceded Uintah lands" (at 1, first paragraph)<br>"The lands within said former reservation . . ." (at 1, second paragraph) |
| LD 159 | Feb. 17, 1923 | H.Rep. 1633, 67th Cong., 4th Sess. at 1 | ". . . lands in the former Uintah Indian Reservation . . ." (at 1)<br>"These lands were formerly embraced in the Uintah Indian Reservation . . ." (at 2, fourth paragraph) |

| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| LD 162 | Feb. 11, 1927 | H.Rep. No. 2047, 69th Cong., 2d Sess. at 3 | ". . . ceded lands" |
| JX 413 | July 27, 1927 | Letter from Act. Commr. of General Land Office | ". . . former Uintah Indian Reservation . . ." (at 1, second paragraph) |
| JX 419 | Apr. 13, 1929 | Letter from Commr. of Indian Affairs | ". . . the former Uintah Indian Reservation . . ." (at first paragraph) |
| JX 423 | Sept. 22, 1931 | Letter from Director of forestry | "ceded" lands (at 2, line 7)<br>". . . the former Uintah Reservation . . ." (at 2, first full paragraph)<br>"ceded" lands (at 2, second full paragraph) |
| JX 424 | Nov. 21, 1931 | Letter from the Forester | "The balance of the area originally forming the large Uintah-Ouray Reservation of 3,972,490 acres is made up of Indian allotments, homesteads, and ceded lands . . ." (at 3, last paragraph) |
| JX 430 | Oct. 14, 1933 | Letter from Commr. of Indian Affairs | ". . . the former Uintah Reservation." |
| JX 441 | Apr. 18, 1938 | Letter from Director of Lands | ". . . the former Uintah and Ouray Indian Reservation." (at first paragraph)<br>"ceded" lands (at first paragraph) |



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| JX 443 | November 1938 | Report of Regional Forester-Grazing Resources on Uintah and Ouray Reservation | ". . . the former Uintah and Ouray Reservation." (at 1, first paragraph; 5, #5; 6, last line)<br>". . . ceded lands . . ." (at 8, sixth and last paragraphs; 9, second, third, fifth and last paragraphs; 8-a, first paragraph; 10, fourth and fifth paragraphs; 11, first and fourth paragraphs) |
| JX 444 | Jan. 24, 1939 | Letter from Supt. of Uintah & Ouray Agency | "ceded" lands (at third paragraph) |
| JX 450 | June 19, 1941 | Letter from Commr. of Indian Affairs | ". . . the former boundaries of the Uintah and Ouray Indian Reservation . . ." (at 1, first paragraph) |
| JX 454 | Jan. 27, 1947 | Opinion of Interior Solicitor, 59 I.D. 393 | "Allotments were made to Indians entitled to allotments within the area, and the balance of the lands . . . were restored to the public domain . . ." (at 393, second paragraph) |
| JX 455 | Undated | Stipulations, *The Uintah and White River Bands of the Ute Indians v. United States* | ". . . allotments in severalty . . . were made to the Uintah and White River Indians, and surplus lands . . . were restored to the public domain . . ." (at 10, last paragraph)<br>". . . the former Uintah Reservation . . ." (at 11, eighth line; 14; paragraph 22; 17, paragraph 25, 23, paragraph 26) |

| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| | | | ". . . the former Uintah Indian Reservation . . ." (at 15, first line; 15, paragraph 23; 17, third full paragraph) |
| LD 200 | Mar. 26, 1956 | Letter from Asst. Secty. of the Interior, located in H.Rep. No. 2171, 84th Cong., 2d Sess. (May 16, 1956), at 4-6 | ". . . lands formerly a part of the Uintah Indian Reservation." (at 4, first paragraph of letter) |
| LD 200 | Mar. 23, 1956 | Letter from Asst. Attorney General, Lands Division, located in H.Rep. No. 2171, 84th Cong. 2d Sess. (May 16, 1956), at 6-8 | ". . . lands formerly a part of the Uintah Indian Reservation." (at 6, first paragraph of letter) |
| LD 200 | Mar. 26, 1956 | Letter from Acting Secty. of Agriculture, located in H.Rep. No. 2171, 84th Cong. 2d Sess. (May 16, 1956) at 8-10 | ". . . lands formerly a part of the Uintah Indian Reservation." (at 8, first paragraph of letter) |
| LD 201 | Apr. 16, 1956 | Letter from Asst. Secty. of the Interior, located in S.Rep. No. 2372, 84th Con. 2d Sess. (June 27, 1956) at 3-5 | ". . . lands formerly a part of the Uintah Indian Reservation." (at 3, first paragraph of letter) |
| LD 201 | Mar. 26, 1956 | Letter from Asst. Attorney General, Lands Division located in S.Rep. No. 2372, 84th Cong. 2d Sess. (June 27, 1956) at 5-7 | ". . . lands formerly a part of the Uintah Indian Reservation." (at 5, first paragraph of letter) |
| LD 201 | Mar. 26, 1956 | Letter from Acting Secty. of Agriculture, located in S.Rep. No. 2372, 84th Cong. 2d Sess. (June 27, 1956) at 7-9 | ". . . lands formerly a part of the Uintah Indian Reservation." (at 7, first paragraph of letter) |



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| LD 201 | Mar. 26, 1956 | Letter from Director of Bureau of the Budget, located in S.Rep. No. 2372, 84th Cong. 2d Sess. (June 27, 1956) at 9 | ". . . lands formerly a part of the Uintah Indian Reservation." (at 9, first paragraph of letter) |
| LD 203 | July 14, 1956 | P.L. 717, 70 Stat. 546, 548 | ". . . the former Uintah Reservation . . ." (Sect. 6, second line) |
| JX 469 | Nov. 18, 1964 | Memo from Solicitor | "In 1902, Congress provided for an allotment and restoration of the balance of unalloted land . . . to the public domain . . ." (at 2, third paragraph) |
| JX 482 | Undated | Memorandum from Comms. of Indian Affairs | ". . . the bulk of the unallotted lands of the Uintah and Ouray Reservation in Utah were to be restored to the public domain . . ." (at 1, first paragraph) |
| LD 210 | Oct. 1, 1971 | Secretarial Order, 36 Fed. Register, No. 198, p. 19920 | ". . . most of the unallotted lands of the Uintah and Ouray Reservation in Utah were restored to the public domain . . ." (at 19920, second column, first full paragraph) |

## APPENDIX C

## LEGISLATIVE AND ADMINISTRATIVE DOCUMENTS CONFIRMING DISESTABLISHMENT OF ORIGINAL UNCOMPAHGRE RESERVATION

| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| JX 108 | Sept. 26, 1898 | Report of the Commr. of Indian Affairs | ". . . the late Uncompahgre Reservation . . ." ". . . the former Uncompahgre Reservation . . ." (at 43, second full paragraph) |
| LD 61 | March 1, 1899 | Act, 30 Stat. 924 | ". . . the former Uncompahgre Indian Reservation in Utah . . ." (at 940, last paragraph) |
| JX 113 | April 12, 1899 | Letter from Commr. of Indian Affairs | ". . . the former Uncompahgre Indian Reservation in Utah . . ." (at 1, third paragraph) |
| JX 115 | Aug. 21, 1899 | Report of the Uintah and Ouray Agency | ". . . the former Uncompahgre Reservation . . ." (at 352, second line) |
| JX 117 | Sept. 30, 1899 | Report of the Commr. of Indian Affairs | ". . . the former Uncompahgre Reservation . . ." (at 32, last line; 352, second line) |
| LD 86 | 1902 | Report of Cyrus C. Babb, U.S. Geological Survey (at 13) | ". . . what was formerly the Uncompahgre Indian Reservation . . ." (at 19, third paragraph) |



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| LD 91 | March 3, 1903 | Act, 32 Stat. 982 | ". . . the former Uncompahgre Indian Reservation . . ." (at 989, first full paragraph) |
| JX 170 | July 28, 1903 | Letter from Commr. of Indian Affairs | ". . . what was formerly the Uncompahgre Reservation . . ." (at 1, fourth line) |
| JX 173 | Aug. 31, 1903 | Letter from Clerk to Agent Mercer | ". . . the former Uncompahgre Reservation . . ." (at 1, fourth line) |
| LD 92 | Nov. 30, 1903 | Letter from Secretary of the Interior | ". . . former Uncompahgre Reservation . . ." (at 1, last paragraph) |
| LD 92 | Nov. 23, 1903 | Letter from Commr. of Indian Affairs (at 2-3) | ". . . former Uncompahgre Reservation . . ." (at 2, second and fifth paragraphs; 3, first paragraph) |
| JX 92 | Aug. 31, 1903 | Letter from Asst. Clerk (at 10) | ". . . former Uncompahgre Reservation . . ." (at 10, first and last paragraphs) |
| LD 101 | Nov. 3, 1903 | Letter from Commr. of Indian Affairs (at 15-16) | ". . . former Uncompahgre Reservation . . ." (at 15, second and fifth paragraphs; 16, first paragraph) |
| LD 101 | Nov. 30, 1903 | Letter from Secretary of the Interior | ". . . former Uncompahgre Reservation . . ." (at 16, second paragraph) |
| JX 186 | July 6, 1904 | Letter from Acting Commr. of Indian Affairs | ". . . the former Uncompahgre Reservation . . ." (at 5, line 3) |
| JX 198 | Oct. 17, 1904 | Report of Commr. of Indian Affairs | ". . . the former Uncompahgre Reservation . . ." (at 347) |

| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| LD 103 | Jan. 20-March 2, 1905 | Excerpts from 39th Congressional Record | ". . . former Uncompahgre Indian Reservation . . ." (at 1181, first paragraph, left column) |
| JX 216 | Jan. 23, 1905 | Letter from Indian Agent Hall | ". . . the former Uncompahgre Reservation . . ." (at first paragraph) |
| JX 224 | Feb. 24, 1905 | Letter from Indian Agent for Uintah and Ouray Agency | ". . . the former Uncompahgre Reservation . . ." (at 3, first full paragraph)<br>". . . the old Uncompahgre Reservation . . ." (at 3, last paragraph; at 5, first full paragraph) |
| JX 232 | Mar. 13, 1905 | Letter from Acting Commr. of Indian Affairs | ". . . the old Uncompahgre Reservation . . ." (at 1, first full paragraph) |
| JX 287 | July 15, 1905 | Letter from Acting Commr. of Indian Affairs | ". . . the old Uncompahgre Reservation . . ." (at 1, second paragraph) |
| JX 323 | Sept. 30, 1905 | Report of the Commr. of Indian Affairs | ". . . the former Uncompahgre Reservation . . ." (at 146, last paragraph) |
| JX 328 | Nov. 27, 1905 | Report of the Secretary of the Interior | ". . . the former Uncompahgre Reservation . . ." (at 1893, first full paragraph) |
| JX 332 | June 6, 1906 | Presidential Proclamation, 34 I.D. 648 | ". . . in the former Uncompahgre Indian Reservation . . ." (at 648, title)<br>". . . the former Uncompahgre Indian Reservation . . ." (at 648, second block quote)<br>". . . in said former Uncompahgre Indian Reservation in Utah . . ." (at 649, first full paragraph) |
| JX 333 | June 25, 1906 | Circular from Commr. of General Land Office, 34 I.D. 650 | ". . . former Uncompahgre Indian Reservation . . ." (at 650, Title, first and second paragraphs; at 651, twelfth paragraph; at 652, bid form) |
| JX 340 | Mar. 14, 1908 | Letter from Acting Commr. of Indian Affairs | ". . . the former Uncompahgre Indian Reservation, in Utah . . ." (at 1) |
| LD 135 | April 30, 1908 | Act, 35 Stat. 70 | ". . . the former Uintah and Uncompahgre Reservations . . ." (at 95, second to last paragraph) |
| LD 150 | Jan. 7, 1915 | Letter from Secretary of the Interior | ". . . the former Uncompahgre Indian Reservation . . ." (at 1, first and second paragraphs) |
| LD 150 | Feb. 18, 1915 | Senate Report No. 1002, 63d Cong., 3d Sess. | "Gilsonite lands within the former Uncompahgre Indian Reservation, Utah." (at 1, Title)<br>". . . the former Uncompahgre Indian Reservation . . ." (at 1, first paragraph; 1, block quote—first & second paragraphs) |
| LD 151 | April 12, 1916 | Letter from Director of U.S. Geological Survey | ". . . the former Uncompahgre-Ute Indian Reservation . . ." (at 2, first full paragraph) |

| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| LD 151 | May 5, 1916 | House Report No. 642, 64th Cong. 1st Sess. | ". . . the former Uncompahgre Indian Reservation . . ." (at 1, first paragraph; 1, block quote—second paragraph; 2, first full paragraph; 4, last paragraph)<br>". . . the lands of the former Uncompahgre Indian Reservation were restored to the public domain . . ." (at 3, last paragraph) |
| LD 152 | May 12, 1916 | Excerpts from 64th Congressional Record | ". . . former Uncompahgre Indian Reservation . . ." at 7862, left column, last paragraph; right column, second, fourth & fifth paragraphs) |
| JX 404 | Oct. 3, 1923 | Letter from Chief Clerk, Office of Indian Affairs | "allotments were made to the Indians and the remainder was restored to the public domain . . . pursuant to the Act of June 7, 1887 . . ." (at 1, second paragraph) |
| JX 426 | 1931 | Memorandum | ". . . lands formerly included in the Executive Order Reservation of January 5, 1882." (at 1) |
| LD 166 | Jan. 28, 1931 | Excerpts from 74th Congressional Record | "The Indians have been given allotments on their former reservation." (at 3406, right column) |

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| JX 428 | June 12, 1933 | Letter from Commr. of Indian Affairs | "The lands not included in individual allotments were restored to the public domain . . ." (at 2, first paragraph) |
| JX 433 | 1934-35 | Memorandum by Director of Forestry | ". . . the old Uncompahgre Reservation . . ." (at 2, second paragraph) |
| JX 435 | July 19, 1935 | Letter from Commr. of Indian Affairs | ". . . the ceded Uncompahgre Reservation . . ." (at 1, first paragraph; at 2, second full paragraph)<br>". . . the former Uncompahgre . . ." (at 2, third paragraph) |
| LD 174 | Mar. 11, 1936 | Letter from Acting Secretary of the Interior | ". . . the former Uncompahgre Ute Reservation . . . subsequently restored to the public domain . . ." (at 1, last paragraph)<br>". . . the former Uncompahgre Ute Reservation . . ." (at 1, last paragraph)<br>". . . the former Uncompahgre Ute Reservation . . ." (at 2, first paragraph)<br>". . . the former Uncompahgre Reservation . . ." (at 2, last paragraph)<br>". . . the former Uncompahgre Executive order reserve of January 5, 1882, all of which was restored to the public domain . . ." (at 2, last paragraph) |

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| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| LD 174 | Apr. 13, 1936 | House Report No. 2339, 74th Cong., 2d Sess. | ". . . the former Uncompahgre Ute Reservation . . ." (at 1, block quote—second paragraph)<br>". . . the former Uncompahgre Indian Reservation . . ." (at 1, block quote—second paragraph)<br>". . . the former Uncompahgre Ute Reservation . . ." (at 2, second line) |
| JX 436 | Nov. 17, 1936 | Letter from Assistant Commr. of Indian Affairs | ". . . the ceded Uncompahgre Reservation . . ." (at first paragraph)<br>". . . action in creating the proposed new Uncompahgre Reservation . . ." (at second paragraph) |
| JX 437 | Dec. 4, 1936 | Letter from Director of Forestry | . . . the ceded Uncompahgre Reservation, Utah." |
| JX 438 | December 1936 | Preliminary Report of Range and Erosion Conditions | ". . . This reservation . . . was restored to the public domain . . ." (at 1, second paragraph)<br>". . . formerly a part of the Old Uncompahgre Reservation and which is now largely public domain . . ." (at 2, first paragraph) |
| JX 444 | Jan. 24, 1939 | Letter from Supt. of Uintah and Ouray Agency | ". . . the old Uncompahgre Reservation . . ." (at second paragraph) |

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| JX 445 | Mar. 21, 1939 | Letter from Supt. of Uintah and Ouray Agency | ". . . the old Uncompahgre lands . . ." (at second paragraph) |
| JX 446 | July 20, 1939 | Memo from Director of Grazing | ". . . the old Uncompahgre Indian Reservation." (at first, second and third paragraphs)<br>"ceded" Indian lands (at second paragraphs) |
| JX 447 | Aug. 8, 1939 | Letter from commr. of Indian Affairs | ". . . the undisposed of lands within the former Uncompahgre Indian Reservation, Utah, have the status of public lands . . ." (at first paragraph)<br>". . . the old Uncompahgre Reservation . . ." (at second paragraph) |
| JX 448 | Oct. 18, 1939 | Letter from Sup. of Uintah and Ouray Agency | ". . . the former Uncompahgre Reservation . . ." (at first paragraph) |
| JX 449 | Oct. 25, 1939 | Letter from Regional Forester | ". . . the former Uncompahgre Reservation . . ." (at 1, first paragraph) |
| JX 451 | Feb. 6, 1943 | Statement | ". . . the former Uncompahgre Reservation . . ." (at 1, first paragraph; 1-2, page turn; 3, second paragraph; 4, fifth line; 4, last paragraph; 5, first paragraph; 5, second paragraph; 13, last paragraph; 14, third paragraph)<br>". . . Congress returned the 1,900 acres of the Uncompahgre Reservation to the public domain [ ] leaving |

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| Doc. No. | Date | Type of Document | Status Reference |
|---|---|---|---|
| | | | 83 allotments . . ." (at 2, second full paragraph)<br>". . . the old Uncompahgre Reservation . . ." (at 3, first paragraph; 4, last paragraph; 7, first block quote; 7, last block quote)<br>" . . . the public domain on their former reservation . . ." (at 3, third paragraph)<br>". . . the former reservation . . ." (at 3, third paragraph)<br>". . . returning the unallotted lands of the reservation to the public domain . . ." (at 4, last paragraph)<br>"ceded" lands (at 10, fifth & seventh paragraph; 11, first full & last paragraphs) |
| LD 181 | Feb. 19, 1943 | House Repart No. 143, 78th Cong., 1st Sess. | ". . . the Ute Indians had a large reservation . . . known as the Uncompahgre Reservation. This was taken away from them . . . and made a part of the public domain." (at 2, paragraph 2) |
| LD 184 | July 24, 1947 | Senate Report No. 749, 80th Cong., 1st Sess. | ". . . the former Uncompahgre Indian Reservation." (at 1, third paragraph) |



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| LD 186 | Jan. 29, 1948 | Leter from the Under Secretary of the Interior | ". . . the former Uncompahgre Reservation . . ." (at 4, block quote—second paragraph) |
| LD 186 | Feb. 12, 1948 | House Report No. 1372, 80th Cong., 2d Sess. | ". . . the former Uncompahgre Reservation . . ." (at 14, block quote—second paragraph) |
| LD 187 | Mar. 11, 1948 | Act, 62 Stat. 72 | ". . . the former Uncompahgre Indian Reservation." (at 77, Sec. 2) |

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In the

**SUPREME COURT OF THE UNITED STATES**

October Term, 1992

**ROBERT P. HAGEN,**

Petitioner,

**v.**

**STATE OF UTAH,**

Respondent.

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**ON WRIT OF CERTIORARI TO THE UTAH SUPREME COURT**

# RESPONDENT STATE OF UTAH'S RESPONSE TO THE MOTION OF THE UTE INDIAN TRIBE TO INTERVENE

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JAN GRAHAM
Attorney General of Utah
DAVID B. THOMPSON
Assistant Attorney General
MICHAEL M. QUEALY
Assistant Attorney General
**(Counsel of Record)**
1636 West North Temple
Suite 300
SALT LAKE CITY UT 84116
(801) 538-7227

--Attorneys for Respondent--

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---

**RESPONDENT STATE OF UTAH'S RESPONSE TO THE MOTION OF THE UTE INDIAN TRIBE TO INTERVENE**

## PREFACE

Movant Ute Indian Tribe has, by consent of the parties, participated in this matter as amicus curiae and opposed certiorari. It now seeks to intervene as a party, aligned with Petitioner Robert P. Hagen. In seeking to justify intervention, the Tribe's motion raises substantive and procedural concerns which will be discussed briefly in Point I below. Moreover, the Tribe's motion also appears to address issues better left to the briefs on the merits, and makes certain inaccurate statements which require brief response or clarification. These will be discussed in Point II.

**POINT I: Response to the Ute Indian Tribe's Motion to Intervene**

The issue in this case is whether the Uintah Valley portion of the Uintah & Ouray Reservation was diminished by a series of congressional acts which culminated in the opening of the reservation to non-Indian settlement in 1905. The dispute involves nearly one million acres of non-Indian land lying within the original exterior boundaries.

The ultimate resolution of the boundary question by this Court is of vital importance to the State of Utah and the affected local governmental entities. This is why Utah supported the granting of certiorari in this case--as did the United States. On the other hand, we can appreciate why the Ute Tribe is also concerned, since the resolution of the boundary dispute will obviously affect the area within which the Tribe may exert its own jurisdiction. Given the interests of the Tribe and the importance of this matter to the Tribe and its members, their rather unusual request to intervene at this late stage of the proceedings is understandable.

However, the Tribe's motion to intervene raises some concerns and observations which we feel should be considered by this Court:

A. Ordinarily, intervention before this Court is rarely granted, although we acknowledge that in certain exceptional circumstances it has been allowed. Arizona v. California, 460 U.S. 605 (1983) (Indian tribes allowed to intervene in an original action involving water rights); Banks v. Chicago Grain Trimmers, 390 U.S. 459 (1968);



Rogers v. Paul, 382 U.S. 198, 199 (1965); Labor Board v. Acme Industrial Co., 384 U.S. 925 (1966), 385 U.S. 432 (1967); and Texas v. Louisiana, 414 U.S. 1107 (1973). The Tribe has already received consent of the parties to participate as amicus curiae, and the United States will undoubtedly file a brief in support of Petitioner Hagen and the Tribe. Even though the Tribe has legitimate interests in the outcome of this matter, we are not certain those interests justify intervention. Further--as a practical matter--it is not clear to us that the Tribe would gain any particular advantage through intervention over the status it already has as amicus.[1]

We are not aware of any reservation diminishment case before this Court where an Indian tribe has asked or been allowed to intervene. In both Seymour v. Superintendent, 368 U.S. 351 (1962), and Mattz v. Arnett, 412 U.S. 481 (1973), the local tribe involved (Colville and Klamath River, respectively) did not participate in the case, either as a party or as amicus curiae. Seymour, 368 U.S. 351-52; Mattz, 412 U.S. 482-83.

In DeCoteau v. District County Court, 420 U.S. 425 (1975), the Sisseton-Wahpeton Sioux Tribe filed an amicus brief with the Court. DeCoteau, 420 U.S. at 426. In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), the Tribe initiated the action below and was already a party when the case reached this Court. In Solem v. Bartlett, 465 U.S. 463 (1984), the Cheyenne River Sioux Tribe participated as amicus. Solem, 465 U.S. at 464. In all of

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[1] The only real advantages we can see to intervention are that as intervenor the Tribe may have a right to file a reply brief and may be in a somewhat stronger position to request oral argument.

the above cases, the United States participated as amicus curiae and, in doing so, aggressively protected tribal interests.

B. The rare instances where this Court has allowed intervention have, to the best of our knowledge, all involved civil actions. This case, however, arises in the context of a criminal proceeding. We have a difficult time perceiving how a person or entity not charged with a crime can intervene in a criminal case, and authorities seem to agree. Gannet Pacific Corporation v. Richardson, 580 P.2d 49, 57-58 (Hawaii 1978); State v. Bianchi, 593 P.2d 1330, 1331 (Wash. 1979); Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi v. United States District Court for the District of South Carolina, 551 F.2d 559, 563 (4th Cir. 1977); and People v. Ham, 734 P.2d 623, 625-26 (Colo. 1987).[2]

The answer to this problem may lie in the fact that the issues in the present proceeding do not involve the guilt or innocence of Petitioner Hagen. Rather, the issue is whether the state court had jurisdiction over the offense in the first place.

C. By the tenor of its motion (Tribe's Motion, pp. 5-7), one may get the impression the Ute Tribe is the party in interest rather than a party in interest. While we

[2] It should be noted that under unique circumstances parties have been allowed to intervene in criminal proceedings in lower state and federal courts. These cases primarily involve challenges to so-called "gag"orders. News American Division, the Hearst Corporation v. State, 447 A.2d 1264 (Ct. App. Md. 1982); News-Press Publishing Co. v. State, 345 So.2d 865 (Ct. App. Fla. 1977); and United States v. Cianfrani, 573 F.2d 835 (3rd Cir. 1978).



cannot speak for Petitioner Hagen, we feel it is important to consider any potential effect the Tribe's intervention may have on him. This is Petitioner Hagen's case, and he is the one facing up to five years in prison.

D. The Tribe's motion advances several arguments as to the importance of allowing it to intervene. Some of these arguments indicate a continuing effort by the Tribe to raise and interject issues which are not presently before this Court. All of the parties urging this Court to grant certiorari did so out of a belief that the conflicting decisions on the reservation boundaries between the state and federal courts needed to be resolved. That is the issue on which this Court granted the petition.

If the Tribe is allowed to intervene, it should not be allowed to broaden the issues beyond those currently framed. Rule 14.1(a); and Irvine v. California, 347 U.S. 128, 129 (1954).

Despite the above observations, our primary concern is that the Court be fully advised in this matter on the issues presented for review. If intervention by the Tribe would materially help to accomplish that end, we do not oppose the Tribe's motion.

## POINT II: Response to Specific Representations Made by the Ute Indian Tribe

Perhaps in its efforts to demonstrate a compelling need for intervention, the Tribe makes certain factual statements which are inaccurate and strays into arguments which should more properly be addressed on the merits.

This is especially true with regard to the equities of the case. We therefore feel compelled to briefly respond to several items raised by the Tribe in its motion.

A. The Tribe correctly notes that the original Uintah & Ouray Reservation consisted of two separate but contiguous tracts, namely the Uintah Valley Reservation and the Uncompahgre Reservation. The Tribe further notes that only the boundaries of the Uintah Valley Reservation are directly at issue here (Tribe's Motion, p. 1, n.1). The total original area of both reservations is just over four million acres. At the same time, the Tribe states that three million acres are at stake in the present case (Tribe's Motion, pp. 5 and 7), and that an affirmance of the Utah Supreme Court's decision "would reduce the Reservation by almost three million acres" (Id., p. 7). Neither statement is accurate.

As stated above, the only reservation directly at issue here is the Uintah Valley Reservation which originally comprised approximately 2,039,040acres (Resp. App., p. 120a, Seth, J., dissenting). There is no dispute that the tribally-owned "trust lands"--amounting to approximately 1.2 million acres--are still "Indian country." Thus, the area here in dispute is just under one million acres of non-Indian land lying within the original Uintah Valley Reservation's boundaries. While this disputed area is obviously large, it is nowhere near the three million acres alleged by the Tribe. We suspect that the Tribe calculated its three-million-acre figure by including the original Uncompahgre Reservation--which is not directly here in dispute.



B. The Tribe alleges, inter alia, that the State of Utah initiated the Hagen/Perank prosecutions two years after the en banc decision of the Tenth Circuit Court (Tribe's Motion, p. 4). This is not an accurate portrayal of what happened. The primary decision by the Utah Supreme Court relating to the reservation boundaries is State v. Perank (Resp. App., p. 4a). The Perank case was under advisement at the time Petitioner Hagen's case reached the Utah Supreme Court. Both decisions were issued the same day, with Perank being the controlling opinion. The criminal charges against Perank were initiated in 1983--well before the Tenth Circuit Court's en banc ruling. In fact, the controlling law at the time Perank was charged was the Tenth Circuit Court's three-judge panel decision which held that the reservation had been diminished.

C. The Tribe implies that it was not allowed to fully participate in the proceedings before the Utah Supreme Court (Tribe's Motion, pp. 6-7). Again, that is not accurate. During the briefing on the Perank case, the State of Utah filed a formal motion with the Utah Supreme Court advising the court that the Ute Tribe had a strong interest in the boundary issue and suggesting that the court may want to invite the Tribe to file an amicus curiae brief. Shortly thereafter, the court invited the Tribe to file a brief.[3]

In response to the invitation by the Utah Supreme Court, the Tribe filed a short amicus curiae brief, but chose not to address the boundary issue. Thus, the Tribe

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[3] A similar invitation was also extended to the United States after the case was submitted.

did, indeed, have ample opportunity to address the boundary issue below, but elected not to.

D. The Tribe suggests that a ruling adverse to it would have negative ramifications for the Tribe and its members (Tribe's Motion, pp. 7-9). We agree that a ruling in this case adverse to the Tribe would carry with it jurisdictional ramifications for the Tribe and its 3,000 members. But that argument goes both ways. A ruling favorable to the Tribe would subject approximately 17,000 non-Indian people residing in the disputed area (and nearly one million acres of non-Indian land) to various forms of tribal jurisdiction by a government in which they have no vote and very little--if any--voice. Further, a ruling favorable to the Tribe would impair the State of Utah's sovereignty and jurisdiction within the disputed area. This is why a resolution of this question is so important.

E. The Tribe argues that an affirmance of the Utah Supreme Court's decision would result in a so-called "checkerboard" area where jurisdiction would be difficult to determine. This issue is clearly one to be argued on the merits. Suffice it to say here that we disagree that any substantial "checkerboarding" would result or that it would present a legal or practical problem in any event.

## CONCLUSION

Subject to the concerns set forth in Point I above, we have no particular objection to the Ute Indian Tribe being allowed to intervene.



Respectfully submitted this 18th day of May, 1993.

JAN GRAHAM
Attorney General of Utah
David B. Thompson
Assistant Attorney General

Michael M. Quealy
Assistant Attorney General
**(Counsel of Record)**
1636 West North Temple
Suite 300
SALT LAKE CITY UT 84116
(801) 538-7227